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January 21, 2022

VIA FIRST CLASS MAIL

Office of the Clerk
Land Court Department of the Trial Court
3 Pemberton Square
Boston, MA 02108

Re: Town of Hopedale v. Jon Delli Priscoli, Trustee of One Hundred Forty Realty Trust, 20 MISC 00467 [DRR]

Dear Sir or Madam:

Enclosed please find the Town of Hopedale's Reply Brief in Support of Motion to Vacate Stipulation of Dismissal. This motion is on for a hearing before Judge Rubin on Monday, January 24, 2022 at 2 PM.

Sincerely,

Peter F. Durning

Enclosure

cc: *via email*
Jennifer E. Noonan, Sessions Clerk to the Hon. Diane R. Rubin
Diana Schindler, Town Administrator, Town of Hopedale
Brian W. Riley
Peter M. Vetere
Donald C. Keavany, Jr.
Andrew P. DiCenzo
David E. Lurie
Harley C. Racer

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January 19, 2022

By First Class Mail

Hon. Paula M. Carey
Chief Justice of the Trial Court
Executive Office of the Trial Court
One Pemberton Square
Boston, MA 02108

RE: Request for Interdepartmental Judicial Assignment and transfer of Town of Hopedale v. Jon Delli Priscoli, et al., Land Court No. 20-MISC-000467 to Worcester County Superior Court and for consolidation with Reilly, et al. v. Town of Hopedale, Grafton & Upton Railroad, et al., No. 2185-cv00238

Dear Chief Justice Carey:

On behalf of the Town of Hopedale (the "Town"), I am writing to supplement my letter dated January 18, 2022, and to provide a fuller response to the Request for Interdepartmental Judicial Assignment (the "Request") filed by Elizabeth Reilly and ten more citizens of the Town of Hopedale ("Citizen Plaintiffs") and the Opposition filed by the Grafton and Upton Railroad Company and Jon Delli Priscoli and Michael Milanoski, Trustees of the One Hundred Forty Realty Trust (the "G&U Defendants").

The Town takes no position on the Request, but writes only to provide further context and perspective on this complex legal matter and to highlight certain legal and equitable considerations that should guide a decision on the Request.

These cases concern the fate of 130 acres of undeveloped forest land in Hopedale that, for nearly 30 years, was enrolled in Massachusetts' Forest Tax Program under G.L. c. 61, § 2, and managed under an approved forestry management plan (the "Chapter 61 Land"). See Forest Management Plan, attached hereto as Exhibit 1. G.L. c. 61, § 8, gives a municipality a right of first refusal whenever the owner of classified forest land would sell or convert the land for development. The residents of the Town unanimously supported the Town's exercise of the statutory right of first refusal and authorized the purchase of all 130 acres of the Chapter 61 Land for $1,175,000 during a special town meeting in October 2020.

It is important to note that the G&U Defendants were not the landowners while the Chapter 61 Land was enrolled in the Chapter 61 program. In June 2020, the G&U Defendants offered to buy the Chapter 61 Land (and other land) from the long-time landowner for $1,175,000. On July 9, 2020, they served the required statutory notice of intent on the landowner's behalf. See G.L. c. 61, § 8. This triggered the Town's right of first refusal. The Town repeatedly indicated that it intended to exercise its statutory right. However, the G&U Defendants tried to withdraw the notice of intent.

Then, on October 12, 2020, instead of purchasing the land directly, the G&U Defendants acquired 100% of the beneficial interest of the nominee trust that held record title to the Chapter 61 Land for $1,175,000. The G&U Defendants thus came to control the Chapter 61 Land. They served notice of the acquisition of the beneficial interest to the Town on October 15, 2020. This independently triggered the Town's right of first refusal. See Goodwill Enterprises, Inc. v. Garland, No. MC15MISC000317RBF, 2017 WL 4801104, at *9-10 (Mass. Land Ct. Oct. 20, 2017) (holding that sale of controlling interest in nominee trust is equivalent to transfer of title sufficient to trigger right of first refusal in lease agreement).

The Town followed every prerequisite of G.L. c. 61, § 8, to perfect the statutory right. On October 30, 2020, the Town's Board of Selectmen exercised the first refusal option after a duly noticed public hearing, and on November 2, 2020, the Town served a notice of exercise on the landowner with a proposed purchase and sale agreement and recorded the notice of exercise in the registry of deeds. The Town took these actions well within 120 days of either July 9(the date of the original notice of intent) or October 15, 2020 (the date of notice of the sale of the beneficial interest of the nominee trust).

The G&U Defendants have repeatedly expressed their intent to develop the Chapter 61 Land for railroad purposes rather than preserve it as forest land, and have on several occasions proceeded with site work and tree clearing activities. The Town brought the Land Court action to enjoin the tree clearing activities and to enforce its statutory right to purchase the Chapter 61 Land. The G&U Defendants then brought an action before the Surface Transportation Board ("STB") seeking a declaratory order that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 (the "ICCTA"), preempted the application of G.L. c. 61, § 8.

After the hearing on the Town's motion for preliminary injunction, the Land Court (Rubin, J.) opined that the July 9 notice was defective but left open the question of whether the acquisition of the beneficial interest independently triggered the Town's Chapter 61 option. See Docket Entry dated Nov. 24, 2020. That question was never adjudicated, however. At the Land Court's suggestion, the parties participated in two mediation sessions and ultimately reached the Settlement Agreement. The Settlement Agreement, *inter alia*, provided that the G&U Defendants, "in consideration of the payment of $587,500, shall effectuate the conveyance of" a certain parcel containing approximately 39 acres of the Chapter 61 Land and other land.

The Town entered into the Settlement Agreement to avoid the litigation costs associated with the Land Court and STB proceedings and to avoid an outcome after extensive litigation where it would end up with none of the Chapter 61 Land. Acquiring and controlling approximately 39 acres of the Chapter 61 Land was the primary consideration for the Settlement Agreement. Without that element of the consideration, the Town would not have entered into any settlement. At the time of the Settlement Agreement (and as the Town subsequently argued in Superior Court), the Town was confident that the Board of Selectmen had sufficient authority to execute the Settlement Agreement, including sufficient authority to apply the money previously appropriated for the acquisition of the entire 130 acres of the Chapter 61 Land to a smaller portion of that parcel along with other adjacent land). Given this posture, the Town agreed to the dismissal of both

proceedings. On February 10, 2021, the parties jointly filed the Stipulation of Dismissal in the Land Court.

Shortly thereafter, the Citizen Plaintiffs filed an action in the Worcester Superior Court. That action resulted in a judgment "enjoining the [Town] from purchasing land as set forth in the Settlement Agreement." See Judgment dated Nov. 10, 2021. The Superior Court (Goodwin, J.) clarified that "[u]ntil the reduced acquisition is approved by Town Meeting, the [settlement] agreement is not effective, and the Town may (but is not required to) attempt to enforce the [Chapter 61] Option." See Memo. of Decision on Defendant Town of Hopedale's Motion for Clarification, dated Dec. 14, 2021, at 2. The Town defended the Settlement Agreement in the Superior Court, but is now compelled to follow the Superior Court's decision and judgment. The G&U Defendants, who did not file any appeal of Judge Goodwin's decision, are likewise compelled to follow the Superior Court's decision and judgment as well.

In the Town's view, by the Superior Court's decision and by operation of law, the Settlement Agreement is not effective unless Town Meeting authorizes the reduced land purchase contemplated in the Settlement Agreement; without that authorization, there is a failure of consideration rendering the entire Settlement Agreement null and void. See Dec. 14 Decision, at 2 n.3 ("In a similar case, a panel of the Appeals Court held that where a particular term was the 'essence and foundation of [a Land Court] settlement agreement … the failure of that consideration [due to a judgment in a subsequent ten-taxpayer action] warranted rescission of the settlement agreement….'"), citing Abrams v. Bd. of Selectmen of Sudbury, No. 09-P-1226, 76 Mass. App. Ct. 1128, 2010 WL 1740435, at *2 (May 3, 2010) (Rule 1:28 decision). In the present context, the Town's waiver of its Chapter 61 rights; the Town's agreement to dismiss the Land Court case; and the other provisions of the Settlement Agreement which the G&U Defendants point to as other consideration are all null and void until the Town receives this authorization.

The Town is thus bound by the Superior Court's injunction preventing the completion of the land purchase contemplated in the Settlement Agreement without explicit authority. However, the Town has good reason to believe that if the Settlement Agreement authorization is brought to a vote, it will surely fail given the expressed will of the Town's residents for the Town to purchase all 130 acres of the Chapter 61 Land. Also, the public health risk in holding an indoor special town meeting at this time is too great to justify a futile vote. Therefore, the Town chose to move to re-open the Land Court action instead of jumping through this trivial hoop only to land in this same position after the vote fails.

The Town appreciates the Citizen Plaintiffs' Request for Interdepartmental Judicial Assignment, but it does not take a specific position with respect to judicial assignment. Both the Land Court and the Superior Court have jurisdiction over the relevant issues in the current action and would have jurisdiction if the Town is required to make some filing to seek formal rescission of the Settlement Agreement. The Town simply wants the opportunity to vindicate its right to the Chapter 61 Land now that the validity of the Settlement Agreement has been called into question. Therefore, the Town will defer to the determination of the Trial Court regarding the appropriate forum for the adjudication of this matter in light of the past procedural history and the Trial Court's assessment of the proper approach to promote judicial efficiency and comity.

The Town also wants to highlight several important legal and equitable considerations that should guide any decision on the Request:

(1) Ownership and control of the Chapter 61 Land changed such that a conversion of the land for development has occurred. This is the scenario for which the statutory right of first refusal exists.

(2) There is a clear trigger date for the Town's exercise of its Chapter 61 option—October 15, 2020, when the G&U Defendants sent written notice of their acquisition of the beneficial interest of the nominee trust holding title to the Chapter 61 Land. The Town took all steps necessary to perfect the Chapter 61 option within 120 days. The Town is thus likely to prevail on a claim that it has a valid and enforceable Chapter 61 option.

(3) First Circuit precedent holds that only activities that facilitate the movement of people or freight have preemptive effect under the ICCTA. See Grosso v. Surface Transportation Bd., 804 F.3d 110, 119 (1st Cir. 2015) (holding that "proper focus" of the STB is on "whether the [railroad] activities … facilitated the physical movement of 'passengers or property'"). The activity at issue here is the acquisition of undeveloped land (or, more accurately, the acquisition of the beneficial interest of a nominee trust holding record title to undeveloped land), which by itself does not immediately facilitate the movement of people or freight. The G&U Defendants are thus likely to fail on their preemption claim.

(4) The Town has a significant public interest in protecting its municipal water supply. The Chapter 61 Land is hydraulically-upgradient of all of Hopedale's public water supply sources and provides an important buffer for protection of the Town's public water supply wells. It is also the only optimal location for siting a new public water supply source in the Town, and ownership of the Chapter 61 Land would ensure that future land uses on the parcel are consistent with water supply protection and would not adversely impact groundwater quality. See also New England Forestry Found., Inc. v. Bd. of Assessors of Hawley, 468 Mass. 138, 151 (2014) ("[P]roperly preserved and managed conservation land can provide a tangible benefit to a community even if few people enter the land … [F]orest land … regulates and purifies the fresh water supply by stabilizing soils that store water over time and filter contaminants.").

(5) Development of any part of the Chapter 61 Land requires site work and tree clearing activities that would irreparably alter the Chapter 61 Land and impair the benefits it provides for protection of the municipal water supply.

(6) There remains a real question as to whether a formal rescission of the Settlement Agreement is required. The Land Court has authority to rescind the Settlement Agreement if necessary. See G.L. c. 185, § 1(k) ("The land court department shall have exclusive original jurisdiction of … [a]ll cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved."). The Town could seek this remedy in a re-opened proceeding, if necessary.

Thank you for the opportunity to provide this supplemental letter. The Town eagerly awaits a decision on the Request.

Peter F. Durning

cc: Hon. Heidi E. Brieger, Chief Justice the Superior Court Department
Hon. Gordon H. Piper, Chief Justice of the Land Court (*via email to Clerk John Batlle*)
Hon. Diane Rubin, Justice of the Land Court (*via email to Clerk Jennifer Noonan*)
Hon. Karen Goodwin, Justice of the Superior Court (*via email to Clerk Laurie Jurgiel*)
Diana Schindler, Hopedale Town Administrator (*via email*)
Brian Riley, Esq. (*via email*)
Don Keavany, Jr., Esq. (*via email*)
Andrew DiCenzo, Esq. (*via email*)
David E. Lurie, Esq. (*via email*)
Harley C. Racer, Esq. (*via email*)

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. LAND COURT DEPARTMENT OF THE TRIAL COURT

TOWN OF HOPEDALE, Plaintiff, v. JON DELLI PRISCOLI and MICHAEL R. MILANOKSI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST, and GRAFTON & UPTON RAILROAD COMPANY, Defendants.	CASE No. 20 MISC 000467 (DRR)

HOPEDALE CITIZENS' EMERGENCY MOTION FOR EXPEDITED HEARING ON THEIR MOTION TO INTERVENE AND JOINDER OF TOWN OF HOPEDALE'S MOTION TO VACATE THE STIPULATION OF DISMISSAL

Elizabeth Reilly and Ten Citizens of the Town of Hopedale[1] ("Hopedale Citizens") respectfully request that this Court schedule an **expedited briefing and hearing** on the Hopedale Citizens' Motion to Intervene to be heard **before** the Court decides the Town of Hopedale's (the "Town") Motion to Vacate the Stipulation of Dismissal (the "Motion to Vacate"). The Hopedale Citizens further request joinder with the Motion to Vacate and the Town's request for a preliminary injunction against any land-clearing activity by the Railroad Defendants[2] pending decision on this request.

[1] Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

[2] Railroad Defendants include Jon Delli Priscoli and Michael Milanoski as the Trustees of the One Forty Realty Trust, and the Grafton & Upton Railroad Company.

The Hopedale Citizens are entitled to be heard on this matter because the Hopedale Citizens: (1) also seek vacating the dismissal and entry of an injunction through Counts I and II of their Intervenor-Complaint; (2) have a strong interest in the matter; and (3) have helpful argument for the Court to consider. It would be patently unfair for the Court to decide the merits of the Motion to Vacate before deciding whether the Hopedale Citizens are allowed to participate. For the reasons set forth below, it is imperative that the Hopedale Citizens be heard on their Motion to Intervene **before** the Court decides the Motion to Vacate.

1. **Because the Board of Selectmen's lack of authority is established, judgment must be vacated.**

The Board of Selectmen lacked the authority to enter into the Settlement Agreement that led to the Stipulation of Dismissal. The Court needs to go no further to vacate the judgment because it is reversible error for a Court to decline to vacate a judgment that was unauthorized. See, e.g., Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (unpublished 1:28 memorandum) (1989) (vacating judgment under Rule 60(b)(6) where City Solicitor entered into an agreement to convey property to a developer without authorization by the City Council or Mayor, resulting in reconveyance of the locus to the city); *discussed favorably in* E. Sav. Bank v. City of Salem, 33 Mass. App. Ct. 140, 142 (1992).[3]

In Salem the Appeals Court ordered that the Rule 70 judgment "was to be vacated because the city council of Salem had neither voted to approve the transfer of land (see G.L. c. 39, § 1, and c. 40, § 3), nor had the mayor, president of the city council, and the chairman of the

[3] While it is clear that the entire Settlement Agreement is a nullity because the material provision – the Town's payment for and acquisition of a portion of the Forestland – was unauthorized, the Court need not consider the Settlement Agreement to allow the Motion to Vacate. The Railroad Defendants' arguments that the severability provision remains in effect or that there is other consideration are merely defenses to be pled in response to the Town's claims brought in its Complaint, wherein the Town seeks an order that it effectively exercised its Option and can enforce the same. The Railroad Defendants' arguments as to the Settlement Agreement are not, however, bars to vacating the unauthorized judgment.

finance committee, as they were empowered to do under a city ordinance, approved the settlement which underlay the rule 70 judgment." E. Sav. Bank, 33 Mass. App. Ct. at 142 (1992), *citing* Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983).

In Bowers, a perpetual encumbrance imposed upon six lots by a board of selectmen in an agreement for judgment was vacated because the agreement, that the Town would cease to use the lots as a public parking area in exchange for the property owner's abandonment of a challenge to the site plan approval for a sewage pumping station, was beyond the authority of the selectmen because it had not been approved by Town Meeting. Bowers, 16 Mass. App. Ct. at 32-34; see also Daly v. McCarthy, 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003) (Lombardi, J.) (in a ten taxpayer suit to enforce the purpose of an agricultural preservation restriction ("APR"), court orders APR deed to be recorded despite settlement agreement entered into by board of selectmen and private trust where the board purported to release the APR without town meeting approval), *affirmed*, Daly v. McCarthy, 63 Mass. App. Ct. 1103 (2005).

This case is no different. The Board was unauthorized to enter into the Settlement Agreement and the judgment that was entered here, without Court review, must be vacated. If a Court is required to vacate an unauthorized agreement for judgment, where the Court considers and approves the underlying agreement, it follows, *a fortiori*, that the denial to vacate an unauthorized judgment entered by stipulation of dismissal, without Court review, is an error of law. It would be reversible error to allow the dismissal to stand, that is, an unauthorized dismissal based on an unauthorized Settlement Agreement that the Superior Court has already ruled is not effective.

2. **The Board is not required to return to Town Meeting before enforcing the Town's c.61 Option.**

The Board is not required to go through the motions, cost and time to schedule and hold a Special Town Meeting to seek authorization under the Settlement Agreement. The Settlement Agreement was not conditioned on obtaining such approval and the Superior Court has held that it is for the Board to choose whether to return to Town Meeting or to enforce the Town's Option.

Moreover, the Railroad Defendants are now estopped from making the argument that the Town, via Town Meeting, is the decision maker as to the terms of the Settlement Agreement. The Railroad successfully argued to the Superior Court that the Board has the sole discretion in deciding whether and how to exercise and enforce the Town's Option. The Superior Court expressly held that it is in the Board's sole discretion. It is now law of the case and the Railroad is not permitted to argue to this Court that the decision lies with Town Meeting or that the Board is required to return to Town Meeting to attempt to seek authorization.

3. **Justice requires that the Hopedale Citizens be heard on their Motion to Intervene and on the Town's Motion to Vacate, as each seek vacatur of the dismissal and preliminary injunction.**

The Hopedale Citizens, without a doubt, have standing pursuant to G.L. c. 40, § 53 to enjoin the execution of the Settlement Agreement and that is **exactly** the relief that they obtained by judgment of the Superior Court. The Single Justice of the Appeals Court also held that the Hopedale Citizens have standing to enjoin the execution of the Settlement Agreement when it reversed the Superior Court's denial of the Hopedale Citizens' request for an injunction. The Hopedale Citizens also have standing via mandamus. The Railroad Defendants, on the other hand, were unsuccessful in their appeal to the Single Justice arguing that the Hopedale Citizens lacked standing to obtain an injunction against them.

Nothing has occurred to dissolve the Hopedale Citizens' standing and their right to protect against the execution or enforcement of the unlawful Settlement Agreement, which is exactly what would occur if the Motion to Vacate were denied. The Hopedale Citizens have standing to vacate the dismissal because retention of the Settlement Agreement, with another court saying it is not effective, leaves unclear the protection of the public's right in the Forestland and whether the Town has effectively waived its rights notwithstanding the Superior Court's rulings, protection of which was the entire basis of the Superior Court Action. If the Motion to Vacate is denied, the injunction entered preliminarily by the Single Justice and permanently by the Superior Court would be effectively reversed by this Court, an unjust result that that would be, itself, subject to reversal.

Likewise, without a preliminary injunction against the Railroad Defendants pending disposition of this dispute, the public's interest in the Forestland that the Hopedale Citizens' have successfully protected would be unjustly lost. It is not enough to rely on the Railroad Defendants' good graces, especially given their track record of unlawfully clearing the Forestland. For these reasons alone, the Hopedale Citizens must be heard **before** the Court decides the Town's Motion to Vacate on the merits.

WHEREFORE, the Hopedale Citizens respectfully request that this Court (1) order expedited briefing and hearing on their Motion to Intervene; (2) allow the Hopedale Citizens to join the Town's Motion to Vacate; (3) not decide the Town's Motion to Vacate until the Hopedale Citizens' Intervention decided; and (4) preliminarily enjoin all land-clearing activity pending decision on all of these.

INTERVENOR-PLAINTIFFS,

Respectfully submitted,

ELIZABETH REILLY, CAROL J. HALL, HILARY SMITH, DAVID SMITH, DONALD HALL, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMING, and JANICE DOYLE,

By their attorneys,

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hracer@luriefriedman.com

Dated: January 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon the attorney of record for each other party by email on January 25, 2022.

Harley C. Racer

CLERK'S NOTICE

DOCKET NUMBER

2185CV00238

Trial Court of Massachusetts
The Superior Court

CASE NAME:
Elizabeth Reilly et al vs. Town of Hopedale et al

Dennis P. McManus, Clerk of Courts

TO:
Brian Walter Riley, Esq.
KP Law, P.C.
101 Arch St
Boston, MA 02110

COURT NAME & ADDRESS
Worcester County Superior Court
225 Main Street
Worcester, MA 01608

You are hereby notified that on 01/25/2022 the following entry was made on the above referenced docket:

Endorsement on Motion for Further Extension of Injunctive Order (#52.0): No Action Taken
No action taken at this time given representation of Grafton & Upton Railroad Company to abide by Superior Court injunction through February 14, 2022. Parties are to submit a status report regarding the Land Court action by February 11, 2022, or upon any action by the Land Court, whichever date comes first. Notices mailed 1/26/22

Judge: Goodwin, Hon. Karen

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
01/26/2022	**Hon. Karen Goodwin**	**(508)831-2350**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.20MISC 00467

TOWN OF HOPEDALE	)
	)
Plaintiff	)
vs.	)
	)
GRAFTON & UPTON RAILROAD COMPANY, et al.	)
	)
	)
Defendants	)

G&U DEFENDANTS' OPPOSITION TO THE HOPEDALE CITIZENS' EMERGENCY MOTION FOR EXPEDITED HEARING ON THEIR MOTION TO INTERVENE AND JOINDER OF TOWN OF HOPEDALE'S MOTION TO VACATE THE STIPULATION OF DISMISSAL

The Hopedale Citizens' Emergency Motion for Expedited Hearing on their Motion to Intervene and for Joinder with the Town's Motion to Vacate the Stipulation of Dismissal should be denied because it is both untimely and meritless. The Hopedale Citizens' Motion continues their pattern of making significant misrepresentations of fact and law which warrants the denial of their Emergency Motion.[1]

I. The "Emergency Motion" is Untimely.

The Court should deny the Citizens' Motion solely because it is untimely. The Town filed its Motion to Vacate Stipulation of Dismissal on December 30, 2021. This Court held a Status Conference on January 12, 2022. Counsel for the Citizens attended the Status Conference and was asked by Judge Rubin whether she should expect a Motion to Intervene. However, rather than immediately move to intervene, the Citizens submitted a lengthy Request for Consolidation and

[1] The Court would be entirely justified in exercising its discretion to deny the underlying Motion to Intervene and to preclude the Hopedale Citizens from any further participation in this action. The Hopedale Citizens have no standing to assert right of first refusal claims on behalf of the Town under G.L. c. 61.

Interdepartmental Transfer seeking to move this case to the Superior Court. The Citizens did not file their Motion for Leave to Intervene until January 20, only two business days before the Court's hearing on the Motion to Vacate Stipulation of Dismissal. The Motion for Leave to Intervene did not request permission to participate in the January 24, 2022 argument on the Town's Motion to Vacate. Indeed, at no point prior to the hearing on the Motion to Vacate did the Citizens request leave to participate. If the Citizens wanted to argue in support of the Town's Motion to Vacate (or their own), they should have requested leave to do so prior to the hearing. The Court has already received full briefing on the Motion to Vacate and heard argument from the Town (the sole party having standing to make this request). There is no reason to duplicate this process for the benefit of the Citizens, who lack any cognizable basis for standing. In short, the Citizens passed up their chance to argue in support of the Motion to Vacate.

II. The Citizens do not Present New or Helpful Argument.

The Citizens claim that they have "helpful argument for the Court to consider." Emergency Motion, p. 2. However, the extent of the authority cited in their Emergency Motion is Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983), an unpublished opinion, Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (1:28)(1989), which cites Bowers, and Daly v. McCarthy, 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003). The Court has already been briefed extensively on Bowers and Daly. It is not at all clear from the Citizens' Motion how further argument on these cases would be helpful to the Court. In fact, the Citizens ignore the clear distinction between this action and Bowers and Daly.

As the Court commented at the hearing on the Motion to Vacate, this case is not Bowers. Among other reasons this is true is that the judgment in Bowers (as well as the judgment in the unpublished Salem Highland Dev. Corp. case cited by the Citizens) was a consent judgment that

by its own terms caused a municipality to convey property interests. The judgment here is a stipulation of dismissal with prejudice which includes no terms at all beyond the dismissal of the case, with prejudice.

The Citizens' unsupported statement at page 3 of their Emergency Motion that:

> "If a Court is required to vacate an unauthorized agreement for judgment, where the Court considers and approves the underlying agreement, it follows, *a fortiori*, that the denial to vacate an unauthorized judgment entered by stipulation of dismissal, without Court review, is an error of law."

conflicts directly with the controlling authority of Quaranto v. DiCarlo, 38 Mass. App. Ct. 411, 412-413 (1995), in which the Appeals Court wrote:

> If a court may not relieve parties of a consent judgment that spells out the terms of settlement, there is even less basis for relief from judgment on the basis of alleged failure to act in accordance with a collateral but extrinsic and unmentioned agreement. This is so for the simplest of reasons: the extrinsic agreement is not part of the judgment which anyone examining the docket or documents in the case would find. The point is not a mechanical one, as the instant case illustrates. In their complaint, the [plaintiffs] had questioned the validity of the [defendants]' record title to the locus. The filing of the judgment in favor of the defendants had the effect of adjudicating the title question. Parties to the litigation and third persons who rely on the outcome of the litigation are entitled to think of the issues in controversy as closed (the time for appealing from the judgment had lapsed) and to act accordingly.

The Quaranto court further noted that there is a significant distinction between enforcement of an underlying settlement agreement and the alteration of a judgment, stating:

> What the [plaintiffs] really want is not an alteration of the judgment, but enforcement of an underlying settlement agreement which they say paved the way for the judgment. Enforcement of such a settlement agreement is more than a continuation of the action in which the judgment was entered; it has its own basis for jurisdiction. For these reasons, the motion for relief from judgment was erroneously allowed, and the order purporting to modify the judgment is vacated.

Id. (citation omitted). The same is true here: a Rule 60(b)(6) motion to vacate a judgment does not confer jurisdiction on the Court to alter or vacate the underlying Settlement Agreement. A party

having standing to seek to rescind a Settlement Agreement must do so in a separate action, and not by a Rule 60(b) motion.

There is no new or helpful argument[2] in the Citizens' Emergency Motion and it should be denied on this basis.

III. The Citizens' Continued Mischaracterizations Warrant Denial of their Motion.

Finally, the Citizens' Emergency Motion should also be denied because it continues of their practice of misstating and mischaracterizing the rulings of the Single Justice and the Superior Court in the Citizens Suit.

The Citizens falsely assert that they "have standing pursuant to G.L. c. 40, § 53 to enjoin the execution of the Settlement Agreement and that is **exactly** the relief that they obtained by judgment of the Superior Court." Emergency Motion, p. 4 (emphasis in original). The Citizens astonishingly assert that the Superior Court judgment "enjoin[ed] the execution of the Settlement Agreement." This is absolutely, one hundred percent, and demonstrably false. The judgment – which the Citizens studiously refuse to quote – only enjoined the Town "from purchasing land as

[2] The Citizens' bizarre argument at the top of page 4 of their Emergency Motion that "the Railroad is not permitted to argue to this Court that the decision lies with Town Meeting or that the Board is required to return to Town Meeting to attempt to seek authorization" is but one example of how their lack of knowledge of this Land Court dispute would be a hindrance, not a help, to this Court in reviewing the relevant issues. The G&U Defendants have never argued that "the Town, via Town Meeting, is the decision maker as to the terms of the Settlement Agreement." Both the G&U Defendants and the Town have consistently, and correctly asserted, that the Board, and only the Board, is authorized to initiate lawsuits and settle lawsuits (including settlement agreement terms) in accordance with Section 32.1 of the Town's General Bylaws. Similarly, the G&U Defendants, the Town and the Superior Court agreed that the Board of Selectmen has the sole authority and discretion to decide whether to waive or exercise a G.L. c. 61 option. The decision to settle a lawsuit, or to exercise or waive a G.L. c. 61 option, does not require Town Meeting approval, and the G&U Defendants and the Town have never argued otherwise. Town Meeting is required to authorize an acquisition of real property and an appropriation associated with that acquisition. Again, due to the success of the ten-taxpayers on Count I of the Citizens Suit, the Town is enjoined from using the funds appropriated at the October 2020 Special Town Meeting to purchase Parcel A. If the Town wants to purchase Parcel A, the Town must go to Town Meeting to receive that authority, and if successful, the G&U Defendants are obligated to convey Parcel A.

set forth in the Settlement Agreement." The effect of the enjoined land purchase on the remainder of the Settlement Agreement has not been litigated, let alone reduced to a judgment.[3]

The Citizens also assert that the Single Justice of the Appeals Court held that they "have standing to enjoin the execution of the Settlement Agreement." This is even more egregiously false than the Citizens' portrayal of the Superior Court judgment. The Single Justice Order – which the Citizens also refuse to quote – reads as follows:

> "Further, it is ordered that Defendant Hopedale Board of Selectmen is enjoined from issuing any bonds, making any expenditures, paying any costs, including without limitation, for land or hydrogeological surveying, or transferring any property interests pursuant to the Settlement Agreement dated February 9, 2021, entered into with the Grafton and Upton Railroad pending further order of this court or a single justice thereof."

The Single Justice did not "enjoin the execution of the Settlement Agreement." He enjoined the Town from spending money, absent new Town Meeting authorization, to purchase property pursuant to one of many provisions of the Settlement Agreement. This order represents the absolute limit of the Citizens' standing under G.L. c. 40, § 53.

The distinction between what the Citizens claim the Superior Court judgment and Single Justice Order say, and what those documents actually say, is cavernous. It would be one thing for the Citizens to argue that one thing (enjoining the execution of the Settlement Agreement) should follow another (enjoining one of many provisions of the Settlement Agreement). But that is not what the Citizens do. Rather, they misquote and mischaracterize these orders as if the Superior Court and Single Justice already granted the relief that they seek here – and even go so far as to

[3] For the reasons set forth in their Opposition to the Town's Motion to Vacate the Stipulation of Dismissal With Prejudice, the G&U Defendants remain steadfast that the Settlement Agreement with, or without the transfer of Parcel A, is supported by more than adequate consideration and is fully enforceable. But, as the Appeals Court in Quaranto held, the question of enforceability of the Agreement goes well beyond the scope of a Rule 60(b)(6) motion, such as the one advanced by the Town.

say that this Court denying Town's Rule 60(b) Motion would be tantamount to "effectively revers[ing]" the Superior Court and Single Justice. To be blunt, these assertions are false.

At a certain point, enough must be enough. This is a dispute between the Town and the G&U Defendants regarding a purported a right of first refusal option under G.L. c 61. The Board has exclusive authority to exercise or waive such a G.L. c. 61 option and the Board has the exclusive authority to initiate and resolve lawsuits. Ten taxpayers do not have such authority. The G&U Defendants should not be required to continually spend time and money correcting the false assertions and mischaracterizations of the Citizens, who have no protectable legal interest in this action and no standing to prosecute claims belonging to the Town. For this reason, the Emergency Motion should be denied.

IV. Conclusion.

For the reasons set forth herein, the G&U Defendants request that this Court deny the Citizens' Emergency Motion.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST,

/s/ Andrew P. DiCenzo
Donald C. Keavany, Jr., BBO# 631216
Andrew P. DiCenzo, BBO# 689291
Christopher Hays, Wojcik & Mavricos, LLP
370 Main Street, Suite 970
Worcester, MA 01608
Tel. 508-792-2800
Fax 508-792-6224
dkeavany@chwmlaw.com
adicenzo@chwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed by email on January 26th, 2022 will be sent by separate email to.

Peter F. Durning, Esq.
Peter M. Vetere, Esq.
Mackie Shea Durning, P.C.
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David E. Lurie, Esq.
Harley C. Racer, Esq.
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Boston, MA 02109
dlurie@luriefriedman.com
hracer@luriefriedman.com

/s/ *Andrew P. DiCenzo*

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.20MISC 00467

TOWN OF HOPEDALE	)
	)
Plaintiff	)
vs.	)
	)
GRAFTON & UPTON RAILROAD COMPANY, et al.	)
	)
	)
Defendants	)

G&U DEFENDANTS' OPPOSITION TO THE HOPEDALE CITIZENS' EMERGENCY MOTION FOR EXPEDITED HEARING ON THEIR MOTION TO INTERVENE AND JOINDER OF TOWN OF HOPEDALE'S MOTION TO VACATE THE STIPULATION OF DISMISSAL

The Hopedale Citizens' Emergency Motion for Expedited Hearing on their Motion to Intervene and for Joinder with the Town's Motion to Vacate the Stipulation of Dismissal should be denied because it is both untimely and meritless. The Hopedale Citizens' Motion continues their pattern of making significant misrepresentations of fact and law which warrants the denial of their Emergency Motion.[1]

I. The "Emergency Motion" is Untimely.

The Court should deny the Citizens' Motion solely because it is untimely. The Town filed its Motion to Vacate Stipulation of Dismissal on December 30, 2021. This Court held a Status Conference on January 12, 2022. Counsel for the Citizens attended the Status Conference and was asked by Judge Rubin whether she should expect a Motion to Intervene. However, rather than immediately move to intervene, the Citizens submitted a lengthy Request for Consolidation and

[1] The Court would be entirely justified in exercising its discretion to deny the underlying Motion to Intervene and to preclude the Hopedale Citizens from any further participation in this action. The Hopedale Citizens have no standing to assert right of first refusal claims on behalf of the Town under G.L. c. 61.

Interdepartmental Transfer seeking to move this case to the Superior Court. The Citizens did not file their Motion for Leave to Intervene until January 20, only two business days before the Court's hearing on the Motion to Vacate Stipulation of Dismissal. The Motion for Leave to Intervene did not request permission to participate in the January 24, 2022 argument on the Town's Motion to Vacate. Indeed, at no point prior to the hearing on the Motion to Vacate did the Citizens request leave to participate. If the Citizens wanted to argue in support of the Town's Motion to Vacate (or their own), they should have requested leave to do so prior to the hearing. The Court has already received full briefing on the Motion to Vacate and heard argument from the Town (the sole party having standing to make this request). There is no reason to duplicate this process for the benefit of the Citizens, who lack any cognizable basis for standing. In short, the Citizens passed up their chance to argue in support of the Motion to Vacate.

II. The Citizens do not Present New or Helpful Argument.

The Citizens claim that they have "helpful argument for the Court to consider." Emergency Motion, p. 2. However, the extent of the authority cited in their Emergency Motion is Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983), an unpublished opinion, Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (1:28)(1989), which cites Bowers, and Daly v. McCarthy, 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003). The Court has already been briefed extensively on Bowers and Daly. It is not at all clear from the Citizens' Motion how further argument on these cases would be helpful to the Court. In fact, the Citizens ignore the clear distinction between this action and Bowers and Daly.

As the Court commented at the hearing on the Motion to Vacate, this case is not Bowers. Among other reasons this is true is that the judgment in Bowers (as well as the judgment in the unpublished Salem Highland Dev. Corp. case cited by the Citizens) was a consent judgment that

by its own terms caused a municipality to convey property interests. The judgment here is a stipulation of dismissal with prejudice which includes no terms at all beyond the dismissal of the case, with prejudice.

The Citizens' unsupported statement at page 3 of their Emergency Motion that:

> "If a Court is required to vacate an unauthorized agreement for judgment, where the Court considers and approves the underlying agreement, it follows, *a fortiori*, that the denial to vacate an unauthorized judgment entered by stipulation of dismissal, without Court review, is an error of law."

conflicts directly with the controlling authority of Quaranto v. DiCarlo, 38 Mass. App. Ct. 411, 412-413 (1995), in which the Appeals Court wrote:

> If a court may not relieve parties of a consent judgment that spells out the terms of settlement, there is even less basis for relief from judgment on the basis of alleged failure to act in accordance with a collateral but extrinsic and unmentioned agreement. This is so for the simplest of reasons: the extrinsic agreement is not part of the judgment which anyone examining the docket or documents in the case would find. The point is not a mechanical one, as the instant case illustrates. In their complaint, the [plaintiffs] had questioned the validity of the [defendants]' record title to the locus. The filing of the judgment in favor of the defendants had the effect of adjudicating the title question. Parties to the litigation and third persons who rely on the outcome of the litigation are entitled to think of the issues in controversy as closed (the time for appealing from the judgment had lapsed) and to act accordingly.

The Quaranto court further noted that there is a significant distinction between enforcement of an underlying settlement agreement and the alteration of a judgment, stating:

> What the [plaintiffs] really want is not an alteration of the judgment, but enforcement of an underlying settlement agreement which they say paved the way for the judgment. Enforcement of such a settlement agreement is more than a continuation of the action in which the judgment was entered; it has its own basis for jurisdiction. For these reasons, the motion for relief from judgment was erroneously allowed, and the order purporting to modify the judgment is vacated.

Id. (citation omitted). The same is true here: a Rule 60(b)(6) motion to vacate a judgment does not confer jurisdiction on the Court to alter or vacate the underlying Settlement Agreement. A party

having standing to seek to rescind a Settlement Agreement must do so in a separate action, and not by a Rule 60(b) motion.

There is no new or helpful argument[2] in the Citizens' Emergency Motion and it should be denied on this basis.

III. The Citizens' Continued Mischaracterizations Warrant Denial of their Motion.

Finally, the Citizens' Emergency Motion should also be denied because it continues of their practice of misstating and mischaracterizing the rulings of the Single Justice and the Superior Court in the Citizens Suit.

The Citizens falsely assert that they "have standing pursuant to G.L. c. 40, § 53 to enjoin the execution of the Settlement Agreement and that is **exactly** the relief that they obtained by judgment of the Superior Court." Emergency Motion, p. 4 (emphasis in original). The Citizens astonishingly assert that the Superior Court judgment "enjoin[ed] the execution of the Settlement Agreement." This is absolutely, one hundred percent, and demonstrably false. The judgment – which the Citizens studiously refuse to quote – only enjoined the Town "from purchasing land as

[2] The Citizens' bizarre argument at the top of page 4 of their Emergency Motion that "the Railroad is not permitted to argue to this Court that the decision lies with Town Meeting or that the Board is required to return to Town Meeting to attempt to seek authorization" is but one example of how their lack of knowledge of this Land Court dispute would be a hindrance, not a help, to this Court in reviewing the relevant issues. The G&U Defendants have never argued that "the Town, via Town Meeting, is the decision maker as to the terms of the Settlement Agreement." Both the G&U Defendants and the Town have consistently, and correctly asserted, that the Board, and only the Board, is authorized to initiate lawsuits and settle lawsuits (including settlement agreement terms) in accordance with Section 32.1 of the Town's General Bylaws. Similarly, the G&U Defendants, the Town and the Superior Court agreed that the Board of Selectmen has the sole authority and discretion to decide whether to waive or exercise a G.L. c. 61 option. The decision to settle a lawsuit, or to exercise or waive a G.L. c. 61 option, does not require Town Meeting approval, and the G&U Defendants and the Town have never argued otherwise. Town Meeting is required to authorize an acquisition of real property and an appropriation associated with that acquisition. Again, due to the success of the ten-taxpayers on Count I of the Citizens Suit, the Town is enjoined from using the funds appropriated at the October 2020 Special Town Meeting to purchase Parcel A. If the Town wants to purchase Parcel A, the Town must go to Town Meeting to receive that authority, and if successful, the G&U Defendants are obligated to convey Parcel A.

set forth in the Settlement Agreement." The effect of the enjoined land purchase on the remainder of the Settlement Agreement has not been litigated, let alone reduced to a judgment.[3]

The Citizens also assert that the Single Justice of the Appeals Court held that they "have standing to enjoin the execution of the Settlement Agreement." This is even more egregiously false than the Citizens' portrayal of the Superior Court judgment. The Single Justice Order – which the Citizens also refuse to quote – reads as follows:

> "Further, it is ordered that Defendant Hopedale Board of Selectmen is enjoined from issuing any bonds, making any expenditures, paying any costs, including without limitation, for land or hydrogeological surveying, or transferring any property interests pursuant to the Settlement Agreement dated February 9, 2021, entered into with the Grafton and Upton Railroad pending further order of this court or a single justice thereof."

The Single Justice did not "enjoin the execution of the Settlement Agreement." He enjoined the Town from spending money, absent new Town Meeting authorization, to purchase property pursuant to one of many provisions of the Settlement Agreement. This order represents the absolute limit of the Citizens' standing under G.L. c. 40, § 53.

The distinction between what the Citizens claim the Superior Court judgment and Single Justice Order say, and what those documents actually say, is cavernous. It would be one thing for the Citizens to argue that one thing (enjoining the execution of the Settlement Agreement) should follow another (enjoining one of many provisions of the Settlement Agreement). But that is not what the Citizens do. Rather, they misquote and mischaracterize these orders as if the Superior Court and Single Justice already granted the relief that they seek here – and even go so far as to

[3] For the reasons set forth in their Opposition to the Town's Motion to Vacate the Stipulation of Dismissal With Prejudice, the G&U Defendants remain steadfast that the Settlement Agreement with, or without the transfer of Parcel A, is supported by more than adequate consideration and is fully enforceable. But, as the Appeals Court in Quaranto held, the question of enforceability of the Agreement goes well beyond the scope of a Rule 60(b)(6) motion, such as the one advanced by the Town.

say that this Court denying Town's Rule 60(b) Motion would be tantamount to "effectively revers[ing]" the Superior Court and Single Justice. To be blunt, these assertions are false.

At a certain point, enough must be enough. This is a dispute between the Town and the G&U Defendants regarding a purported a right of first refusal option under G.L. c 61. The Board has exclusive authority to exercise or waive such a G.L. c. 61 option and the Board has the exclusive authority to initiate and resolve lawsuits. Ten taxpayers do not have such authority. The G&U Defendants should not be required to continually spend time and money correcting the false assertions and mischaracterizations of the Citizens, who have no protectable legal interest in this action and no standing to prosecute claims belonging to the Town. For this reason, the Emergency Motion should be denied.

IV. Conclusion.

For the reasons set forth herein, the G&U Defendants request that this Court deny the Citizens' Emergency Motion.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST,

/s/ Andrew P. DiCenzo
Donald C. Keavany, Jr., BBO# 631216
Andrew P. DiCenzo, BBO# 689291
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Fax 508-792-6224
dkeavany@chwmlaw.com
adicenzo@chwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed by email on January 26th, 2022 will be sent by separate email to.

Peter F. Durning, Esq.
Peter M. Vetere, Esq.
Mackie Shea Durning, P.C.
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Boston, MA 02109
dlurie@luriefriedman.com
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/s/ *Andrew P. DiCenzo*

MACKIE SHEA DURNING PC

COUNSELORS AT LAW

20 Park Plaza, Suite 1001, Boston, MA 02116 • p 617 266 5700 f 617 266 5237

www.mackieshea.com

January 26, 2022

VIA FIRST CLASS MAIL

Office of the Clerk
Land Court Department of the Trial Court
3 Pemberton Square
Boston, MA 02108

Re: Town of Hopedale v. Jon Delli Priscoli, Trustee of One Hundred Forty Realty Trust, 20 MISC 00467 [DRR]

Dear Sir or Madam:

Enclosed please find the Town of Hopedale's Status Report.

Sincerely,

Peter F. Durning

Enclosure

cc: *via email*
Jennifer E. Noonan, Sessions Clerk to the Hon. Diane R. Rubin
Diana Schindler, Town Administrator, Town of Hopedale
Brian W. Riley
Peter M. Vetere
Donald C. Keavany, Jr.
Andrew P. DiCenzo
David E. Lurie
Harley C. Racer

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

WORCESTER, SS. CASE NO. 20 MISC 000467 (DRR)

TOWN OF HOPEDALE,

Plaintiff,

v.

JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST, and GRAFTON & UPTON RAILROAD COMPANY,

Defendants.

STATUS REPORT

Pursuant to Judge Rubin's January 12, 2022, Docket Entry requesting that Plaintiff's counsel notify the Court as to any decision on the Town of Hopedale's Emergency Motion to Extend Injunction in the Superior Court, attached hereto as **Exhibit 1**, please find the Clerk's Notice that was docketed by Judge Goodwin in the Superior Court on January 26, 2022.

As noted in the Clerk's Notice, the Superior Court is taking "no action" on the Emergency Motion to Extend Injunction. The Superior Court stated, "[n]o action taken at this time given representation of Grafton & Upton Railroad Company to abide by Superior Court injunction through February 14, 2022."

In addition to reporting the above Clerk's Notice, the Town would also like to inform Judge Rubin that the Town of Hopedale Select Board has scheduled both a public and executive session meeting on Monday, January 31, 2022, in which the Select Board intends to discuss this

matter. The Plaintiffs intend to file a Second Status Report to the Land Court on Tuesday, February 1, 2022, following those meetings.

Respectfully submitted,

TOWN OF HOPEDALE

By its attorneys,

Peter F. Durning (BBO# 658660)
Peter M. Vetere (BBO# 681661)
MACKIE SHEA DURNING, P.C.
20 Park Plaza, Suite 1001
Boston, MA 02116
(t) (617) 266-5104
pdurning@mackieshea.com
pvetere@mackieshea.com

Dated: January 26, 2022

CERTIFICATE OF SERVICE

I certify that on January 26, 2021, I served this Status Report by emailing a copy thereof to their attorney, Donald C. Keavany, Jr., Esq., of Christopher Hays, Wojcik & Mavricos, LLP, 370 Main Street, Suite 970, Worcester, Massachusetts.

Signed under the penalties of perjury.

Peter F. Durning

Exhibit 1

CLERK'S NOTICE

DOCKET NUMBER

2185CV00238

Trial Court of Massachusetts
The Superior Court

CASE NAME:
Elizabeth Reilly et al vs. Town of Hopedale et al

Dennis P. McManus, Clerk of Courts

TO:
Brian Walter Riley, Esq.
KP Law, P.C.
101 Arch St
Boston, MA 02110

COURT NAME & ADDRESS
Worcester County Superior Court
225 Main Street
Worcester, MA 01608

You are hereby notified that on 01/25/2022 the following entry was made on the above referenced docket:

Endorsement on Motion for Further Extension of Injunctive Order (#52.0): No Action Taken
No action taken at this time given representation of Grafton & Upton Railroad Company to abide by Superior Court injunction through February 14, 2022. Parties are to submit a status report regarding the Land Court action by February 11, 2022, or upon any action by the Land Court, whichever date comes first. Notices mailed 1/26/22

Judge: Goodwin, Hon. Karen

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
01/26/2022	**Hon. Karen Goodwin**	**(508)831-2350**

LURIE FRIEDMAN LLP

ONE MCKINLEY SQUARE
BOSTON, MA 02109

HARLEY C. RACER

617-367-1970
hracer@luriefriedman.com

January 20, 2022

By U.S. Mail

Hon. Jeffrey A. Locke
Chief Justice of the Trial Court
Executive Office of the Trial Court
One Pemberton Square
Boston, MA 02108

RE: Request for Interdepartmental Judicial Assignment and transfer of Town of Hopedale v. Jon Delli Priscoli, et al., Land Court No. 20-MISC-000467 to Worcester County Superior Court and for consolidation with Reilly, et al. v. Town of Hopedale, Grafton & Upton Railroad, et al., No. 2185-cv00238

Dear Chief Justice Locke:

On behalf of Elizabeth Reilly and ten more citizens of the Town of Hopedale ("Citizen Plaintiffs") in the action styled Reilly, et al. v. Town of Hopedale, Grafton & Upton Railroad, et al., No. 2185-cv-00238 in Worcester Superior Court ("Citizen Action"), I write to supplement and update our request that the action styled Town of Hopedale v. Jon Delli Priscoli, et al., Land Court No. 20-MISC-000467 ("Land Court Action") be transferred to Worcester Superior Court to be consolidated with the Citizen Action and/or specially assigned to Hon. Karen L. Goodwin to promote speedy disposition, judicial economy and afford complete and permanent relief to the parties. Our original Request was made to your predecessor, Hon. Paula M. Carey, by letter dated January 13, 2022. The Railroad Defendants opposed the Request by letter dated January 14, 2022, and the Town of Hopedale, by letter dated January 19, 2022, provided important context to guide any decision on the Request but took no position on the Request.

Today, the Citizen Plaintiffs filed a Motion for Leave to Intervene in the Land Court Action (the "Motion to Intervene"). A copy of the Motion is included herewith (without exhibits or the Intervenor-Complaint). The Motion to Intervene further justifies the Request to transfer the Land Court Action to be consolidated with the Citizen Action and specially assigned to Hon. Karen L. Goodwin because the Intervenor-Complaint will add the Citizens Plaintiffs as parties and because standing is based, in part, on M.G.L. c. 40, § 53. As discussed at note 10 of the Citizen Plaintiff's Motion to Intervene, by filing in the Land Court Action, the Citizen Plaintiffs are following the lead of, and joining, the Town of Hopedale, which filed its Motion to Vacate the Stipulation of Dismissal in the Land Court even though to the extent standing is based on c. 40, § 53, ten taxpayers lawsuits are to be brought in the Superior Court. The Citizen Plaintiffs did this to promote judicial efficiency and economy and to avoid opening yet another action in the Superior Court. However, as noted, to the extent any jurisdictional issue is created, it is

readily cured by transfer of the Land Court Action to the Superior Court and consolidation in the Citizen Action and/or special assignment to Hon. Karen L. Goodwin, as the Citizen Plaintiffs have Requested.[1]

The Land Court Action should be transferred and assigned to Judge Goodwin in the Superior Court regardless of the Citizen Plaintiffs' intervention, but by filing the Motion to Intervene, the Railroad Defendants' primary ground for opposition to the Request is rendered moot – that the Citizen Plaintiffs are not parties to the Land Court Action. At any rate, the G&U Defendants' Opposition to the Request gets much wrong, including a complete misunderstanding and misrepresentation of Judge Goodwin's Orders. Judge Goodwin ruled, without equivocation in the December 21, 2021 Order that "the Settlement Agreement is not effective." Order at 2 (emphasis added). The G&U Defendants spuriously claim that this is "dicta" or, even worse, that Judge Goodwin lacked jurisdiction over the G&U Defendants. Regardless, their fury over the interpretation and effect of Judge Goodwin's Orders only proves the point – this dispute should remain with Judge Goodwin in the Superior Court.

Thank you for your attention to this matter.

Very truly yours,

Harley C. Racer

Enclosure

cc: Hon. Heidi E. Brieger
Chief Justice the Superior Court Department
Hon. Gordon H. Piper (by email)
Chief Justice of the Land Court
Hon. Diane Rubin (by email)
Justice of the Land Court
Hon. Karen Goodwin (by U.S. mail)
Justice of the Superior Court
Peter Durning, Esq. (by email)
Brian Riley, Esq. (by email)
Don Keavany, Jr., Esq. (by email)
Andrew DiCenzo, Esq. (by email)
David E. Lurie, Esq. (by email)
Elizabeth Reilly (by email)

[1] In the alternative, the Citizen Plaintiffs would request that Hon. Diane R. Rubin be designated as a Superior Court judge by interdepartmental assignment to hear the Citizen Plaintiffs' claims. See, e.g., Ritter v. Bergmann, 72 Mass. App. Ct. 296, 301, n. 9 (2008).

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.20MISC 00467

TOWN OF HOPEDALE	)
	)
Plaintiff	)
	)
vs.	)
	)
	)
JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST and GRAFTON & UPTON RAILROAD COMPANY,	)
	)
Defendants	)

AFFIDAVIT OF DONALD C. KEAVANY, JR., ESQ.

Now comes Donald C. Keavany, Jr., who on oath deposes and says as follows:

1. I am a member in good standing of the Massachusetts Bar and a partner at the law firm Christopher, Hays, Wojcik & Mavricos, LLP. I represent the defendants in this matter.

2. Attached hereto as Exhibit 1 is a true and accurate copy of the Judgment on the Pleadings which entered in the matter of Elizabeth Reilly et al v. Town of Hopedale et al, Worcester Superior Court Docket No. 2185CV00238 (hereinafter the "Citizens Suit") on November 10, 2021.

3. Attached hereto as Exhibit 2 is a true and accurate copy of the Opposition of Town of Hopedale, Louis J. Arcudi, III, and Brian R. Keyes to Plaintiffs' Motion for Preliminary Relief, docketed in the Citizen Suit on March 9, 2021.

4. Attached hereto as Exhibit 3 is a true and accurate copy of the Memorandum of Defendants Town of Hopedale and Hopedale Board of Selectmen in Response to Plaintiffs'

Motion for Judgment on the Pleadings and Cross-Motion for Judgment on the Pleadings, docketed in the Citizens Suit on June 3, 2021.

5. Attached hereto as Exhibit 4 is a true and accurate copy of the February 7, 2021 letter from Lurie Friedman, LP to the Hopedale Board of Selectmen.

Signed under the penalties of perjury this 18th day of January 2022

/s/ Donald C. Keavany, Jr.

CERTIFICATE OF SERVICE

I hereby certify that this document filed by email on January 18, 2022 will be sent by separate email to.

Peter F. Durning, Esq.
Peter M. Vetere, Esq.
Mackie Shea Durning, P.C.
20 Park Plaza, Suite 1001
Boston, MA 02116
pdurning@mackieshea.com
pvetere@mackieshea.com

/s/ Donald C. Keavany, Jr.

EXHIBIT 1

JUDGMENT ON THE PLEADINGS	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 2185CV00238	Dennis P. McManus, Clerk of Courts
CASE NAME Reilly, Elizabeth et al vs. Town of Hopedale et al	COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

This action came before the Court, Hon. Karen Goodwin, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof;

46

It is **ORDERED AND ADJUDGED**:

Judgment to enter for the Plaintiffs on Count I, enjoining the Board of Selectmen and The Town of Hopedale from purchasing land as set forth in the Settlement Agreement and the Railroad Defendants are enjoined for 60 days from the date of this Judgment from carrying out any work on the contested forest land. Counts II and III are hereby dismissed.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
11/10/2021	X

Date/Time Printed: 11-10-2021 11:20:54

SCV117: 07/2016

Entered and Copies Mailed 11/10/21

EXHIBIT 2

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILLARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMMING, and JANICE DOYLE,

Plaintiffs,

v.

TOWN OF HOPEDALE, LOUIS J. ARCUDI, III, BRIAN R. KEYES, GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, MICHALE MILANOSKI, and ONE HUNDRED FORTY REALTY TRUST,

Defendants.

OPPOSITION OF DEFENDANTS TOWN OF HOPEDALE, LOUIS J. ARCUDI, III AND BRIAN R. KEYES TO PLAINTIFFS' MOTION FOR PRELIMINARY RELIEF

The defendants Town of Hopedale and Louis J. Arcudi, III and Brian R. Keyes, named in their capacity as members of the elected Hopedale Board of Selectmen (hereinafter "Town" or "Board"), hereby submit their opposition to the Plaintiff's request for preliminary relief. On October 24, 2020, a Special Town Meeting authorized the Board to acquire certain parcels of real property totaling approximately 155 acres, and further authorized the Town Treasurer, subject to the Board's approval, to issue bonds in the amount of $1,175,000 to pay for these parcels. Approximately 130 of these acres were forested parcels that had been taxed pursuant to General Laws Chapter 61, giving the Town a right of first refusal if the owner intended to sell or change the use of the property. The Town could only acquire the remaining 25 acres by eminent domain, and the Special Town Meeting also voted to authorize the Board to do so. After the

Special Town Meeting, the Board initiated an action in Land Court to prevent the remaining Defendants in this action (hereinafter referred to generally as "the Railroad") from taking any actions regarding the property that would impact the Town's right of first refusal.

After a Land Court hearing on November 23, 2020, during which the Court (Rubin, J.) expressed skepticism as to the Town's ultimate ability to acquire the 155 acres, the Court issued a mediation screening order. Following mediation before retired Land Court Justice Lombardi (who also expressed doubts as to the Town's likelihood of success against the Railroad and encouraged a settlement), the parties entered into a settlement agreement with the Railroad (hereinafter "Settlement Agreement"), in which the Town would acquire approximately 64 acres of the property the Special Town Meeting authorized for acquisition, as well as an additional 20 acre parcel (Parcel D on Exhibit 1 to the Verified Complaint) that will require a new vote of Town Meeting to authorize acceptance. The essence of the Plaintiffs' complaint is that it would violate Massachusetts law for the Board to acquire less than the original 155 acres, or to spend less than $1,175,000 to acquire the entire 155 acres of property. While the Plaintiffs may oppose the Settlement Agreement in principal, there are no facts to support that the Town is illegally intending to carry out the provisions of the Settlement Agreement or unlawfully exercising its legal authority pursuant to G.L. c.40, §53, and therefore the Complaint should be dismissed.

FACTS AS PLED IN THE COMPLAINT

The Town accepts the following facts as true for purposes of this motion only.

1. This case primarily involves 155 acres of undeveloped and forested property at 364 West Street, held by the One Hundred Forty Realty Trust, 130 acres of which have been classified and taxed as forestland pursuant to G.L. c.61. Complaint, ¶14. While unstated in the Complaint, this property is zoned in an Industrial District.

2. The remaining 25 acres are not subject to Chapter 61. Complaint, ¶15.
3. In June 2020, the Trustee of the One Hundred Forty Trust negotiated a purchase and sale agreement with the Railroad to sell the 155 acres to the Railroad. The Trustee later assigned the beneficial interest in the property to the Railroad. Complaint, ¶¶ 23, 34.
4. While the Trustee provided notice of the P&S agreement to the Town, a trigger to the Town's right of first refusal for the forestland, the Board objected to the notice as defective in that it included the 25 acres that were not subject to Chapter 61, and further asserted its right of first refusal based on the assignment of the beneficial interest in the 130 acres to the Railroad. Complaint, ¶41.
5. On October 24, 2020, a Special Town Meeting took two votes relevant to this litigation. The first, on Article 3 of the warrant, authorized the Board to acquire the 130 acres, and further to appropriate and issue bonds in the amount of $1,175,000 to pay for the property. Complaint, ¶44 and Exhibit 12 to Complaint. Notably, the vote did not contain any qualifier that the Board must acquire the entire 130 acres, nor did it seek to require the Board to expend all of the $1.175 million appropriation authorization.
6. The second vote, on Article 5 of the warrant, authorized the Board to acquire the 25 acre parcel by eminent domain, pursuant to G.L. c.79, and appropriated $25,000 to pay for it. Complaint, ¶48 and Exhibit 12 to Complaint. Notably, the vote contained no qualifier that the Board must acquire all 25 acres.
7. As demonstrated by the Board's efforts to exercise the Town's right of first refusal and record an Order of Taking under G.L. c. 79, the Board took all steps to acquire the 155 acres as authorized by the Special Town Meeting. Complaint, ¶¶ 49, 51-55.

8. After the Town Meeting, to seek an order stopping the Railroad from clearing the forestland and to assert its right of first refusal, the Town commenced an action in Land Court, Town of Hopedale v. Jon Delli Priscoli, Trustee of the One Hundred Forty Realty Trust, et al., 20 MISC 000467.
9. The Railroad also filed a petition with the Surface Transportation Board, a federal agency that regulates matters involving railroads, particularly freight rail. The Railroad sought a declaratory order that federal law preempts the Town's authority to acquire any of the subject property, under either G.L. c.61 or G.L. c.79. Complaint, ¶56.
10. Following a November 23, 2020 hearing in Land Court on the Town's motion for preliminary injunction, which the Court denied, Judge Rubin issued an order referring the case to mediation. While Judge Rubin's decision denying the preliminary injunction does not so state, counsel for the Town understood the Court to be expressing that mediation was advisable as the Towns claims to the 155 acres may not be successful.
11. As a result of the mediation, during which Judge Lombardi also encouraged a settlement. The Town and the Railroad reached an agreement to resolve both the Land Court litigation and the Surface Transportation Board matter. The Settlement Agreement, attached to the Complaint as Exhibit 19, speaks for itself, but in summary, the Town will acquire Parcel A (approximately 64 acres), all of which was included in the Special Town Meeting's votes on Articles 3 and 5 of the October 24, 2020 warrant. The Railroad also agreed to donate Parcel D, approximately 20 acres, but since this was not part of the Special Town Meeting vote, a vote of Town Meeting is required in accordance with G.L. c.40, §14.

ARGUMENT

A. Preliminary Injunction Standard

To obtain a preliminary injunction against a governmental entity or public official, the plaintiffs must show that: (1) they have a likelihood of success on the merits; (2) they will suffer immediate, irreparable harm without injunctive relief that outweighs the harm the public officials will suffer if restrained; and (3) the requested injunctive relief will not adversely affect the public interest. Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001); Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). See also LeClair v. Town of Norwell, 430 Mass. 328, 331-32 (1999), which like the case at bar concerned a ten-taxpayer claim pursuant to G.L. c.40, §53:

> A judge, in these circumstances, must first determine whether there is a likelihood of success on the merits of a plaintiff's claims and then determine whether "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth v. Mass. CRINC,* 392 Mass. 79, 89, 466 N.E.2d 792 (1984). Moreover, where a statutory violation is alleged, the judge should specifically consider how the statutory violation affects the public interest. *Id.* General Laws c. 40, § 53, provides a mechanism for taxpayers to enforce laws relating to the expenditure of tax money by the local government. *Edwards v. Boston, supra* at 646, 562 N.E.2d 834. In cases brought under this statute, the taxpayers are acting as private attorneys general. *Id.* Thus, the taxpayers must show a likelihood of success on the merits and that the requested relief would be in the public interest. *Id.* at 646–647, 562 N.E.2d 834.

The Town submits that the Plaintiffs cannot show a likelihood of success on the merits of their claims, and that the public interest actually weighs in favor of the Settlement Agreement's terms, and that the request for preliminary relief/injunction should therefore be denied.

B. Plaintiffs Do Not Have a Likelihood of Success on the Merits

While the Plaintiffs' include numerous facts and allegations that are not relevant to the legal issues and outcome of this case pursuant to G.L. c.40, §, the Complaint may be summarized as two primary claims:

a) Since Town Meeting authorized the Board to acquire approximately 155 acres, 130 acres of which has been subject to G.L. c.61, the Board cannot lawfully acquire a lesser amount of property; and

b) The Board lacked authority to waive the Chapter 61 right of first refusal. This claim clearly fails to allege any violation of G.L. c.40, §53, but the Board shall address it below.

The Board submits that, prior to the Land Court's directive to participate in mediation, it fully intended to acquire all 155 acres, and it exercised (or attempted to exercise) the authority granted by the Town Meeting votes to do so. During the course of the Land Court proceedings and mediation, however, the Board determined that pursuing its Land Court case to trial, as well as having to defend the Town's position before the Surface Transportation Board, would not only be prohibitively expensive but could well result in the Town receiving **none** of the 155 acres. The Board determined, therefore, that it would be more in the public interest to resolve the litigation with the Settlement Agreement.

C. The Board Had Legal Authority to Acquire Less than 155 Acres.

The Plaintiffs allege that because the Special Town Meeting vote had such clear support to acquire all 155 acres at issue, the Board lacked legal authority to approve the Settlement Agreement that acquire approximately 85 acres – 40 acres that was subject to Chapter 61, 25 acres that was to be acquired by eminent domain, and another 20 acres (Parcel D on the plan attached to the Settlement Agreement as Exhibit 1) that was not involved in the Special Town Meeting votes. Notwithstanding the Complaint's allegations, however, there is no legal support for this allegation and the Agreement's terms do not violate G.L. c.40, §53.

In order for a town to acquire real property, there must be a favorable vote of Town Meeting pursuant to G.L. c.40, §14 to do so – a majority vote is sufficient if there are no funds being spent, but a two-thirds vote if there is an appropriation (the Special Town Meeting vote was recorded as unanimous). As stated expressly in the Settlement Agreement, the Town may not accept the donation of the 20 acre "Parcel D" until there is a further Town Meeting vote to authorize it. As for the other 65 acres, however, these parcels were already authorized by Town Meeting vote for acquisition, and there were no limiting conditions in such votes to restrict how the Board could exercise its authority. Massachusetts case law clearly establishes that while a Board of Selectmen cannot acquire property that was not authorized by Town Meeting, Town Meeting cannot compel the Board to complete such acquisition and the Board may legally acquire less property than authorized. See Russell v. Town of Canton, 361 Mass. 727 (1972).

Plaintiffs argue that Russell should not govern, as that case only involved a minor difference in acreage while here there is a significant difference. This argument inserts limiting language in the decision that the Supreme Judicial Court did not state, however:

> *One argument made by the plaintiffs is that the town vote expressly directed the board to take all of their land, and that the board had no discretion to take less than all of it. This argument is without merit. The selectmen are public officers whose powers and duties with reference to eminent domain are fixed by statute. It is questionable whether a town meeting vote can operate to direct or command them in the discharge of their duties.…We hold that the town could authorize the selectmen to take real estate by eminent domain, but that it could not direct or command them to do so. Although G.L. c. 40, s 14, requires that before land is taken by eminent domain the taking be authorized by a vote of the town, it vests the power to make the taking in the selectmen of the town. There is nothing in s 14 which makes such an authorization binding on the selectmen, or which prevents them from exercising their discretion and sound judgment in deciding whether to make a taking pursuant to the authorization. If the selectmen, being authorized by the town to make a taking, do not make it, the decision is not judicially reviewable as to its wisdom.* (emphasis added)

Russell at pg. 730. As discussed above, the Board was authorized to acquire 155 acres, but the during the Land Court proceedings (and the impending Surface Transportation Board petition),

the Board made a discretionary decision that accepting 85 acres was much more in the public interest than pursing lengthy and costly litigation with a very real possibility that the Town could end up with nothing due to federal law preemption. As the Supreme Judicial Court stated in Russell, not only is such an executive decision not a matter for Town Meeting, it is not something readily subject to judicial review either. The Plaintiffs claim that the Board could not acquire less than 155 acres has no legal support and there is no likelihood of success on the merits.

D. The Board's Waiver of the Right of First Refusal was Valid.

As part of the Settlement Agreement, the Board agreed to waive its right to further exercise any right of first refusal the Town has pursuant to G.L. 61, §8. The Plaintiffs argue extensively that the Board has no authority to do so and that it was required to seek a further vote of Town Meeting, claiming that "those rights cannot be waived as a matter of law and there was no approval by Town Meeting to not exercise or waive those rights." Complaint, ¶121. As with the property acquisition issue in Section C above, however, the Plaintiffs ignore the fact that exercising a right of first refusal is an executive function that only a Board of Selectmen can accomplish. Chapter 61, §8 details the procedures when an owner of forestland being taxed under the statute intends to alter the use of the property (by the owner or a prospective new owner). This includes a notice and copy of the purchase and sale agreement submitted to the Town, triggering a right of first refusal for the Town that must be exercised within 120 days or the right is lost. The Land Court proceedings include the issue of whether the original notice to the Town was valid; however, as part of the settlement, the Board agreed not to further seek to enforce the right of first refusal.

The actual action that a town must take to exercise a right of first refusal is stated in §8 as follows:

> **This option may be exercised only after a public hearing followed by written notice signed by the mayor or board of selectmen, mailed to the landowner by certified mail at such address as may be specified in the notice of intent. Notice of the public hearing shall be given in accordance with section 23B of chapter 39. The notice of exercise shall also be recorded at the registry of deeds and shall contain the name of the record owner of the land and description of the premises adequate for identification of it.**

It is notable, of course, that neither these paragraphs nor anywhere in §8 is there any reference to a vote of Town Meeting. This is because such exercise is, again, an executive action whose sole authority resides with the Board of Selectmen. If, for example, a Board of Selectmen receives a valid §8 notice for conversion of forestland, it may determine on its own that the Town should not acquire the property – it may either send written notice to the owner waiving the right of first refusal or simply allow the 120 days to run without acting. There is nothing Town Meeting or anyone else can do to exercise the right of first refusal in such a case. Before the Board can actually acquire property by exercising such right, it must obtain a vote of Town Meeting to authorize acquisition and appropriate funds. But, the right of first refusal itself is exclusive to the Board, and so the Board may waive its ability to exercise such right.

E. It Is Not Unlawful For The Board To Agree To Expend $587,500.

Similar to the claims addressed above, the Plaintiffs allege that it is unlawful for the Board to agree to expend $587,000 for the 64 acres it is to receive by purchase, because Town Meeting appropriated $1,175,000 for the entire 155 acres and the Board may not agree to spend less. The Town first submits that the Plaintiffs' reliance on the difference between how much the Town is paying per acre under the Settlement Agreement versus what the Railroad paid is a red herring; the two amounts were not negotiated on a per acre price and involve different

purposes for acquisition, and the Town Meeting appropriation vote was a bottom line figure and not per acre. Moreover, the Settlement Agreement proposes the Town acquiring 20 acres that were never a part of the Special Town Meeting votes or the Land Court. Most importantly, however, whenever Town Meeting appropriates funds – whether to acquire property, contract for services, or fund annual department operating budgets – the Town is not obligated to spend all of the appropriation, but it spends what is needed. Regardless of how the Plaintiffs feel about the Settlement Agreement terms, it is clearly not unlawful for the Board to authorize spending $587,000 of the amount appropriated by Town Meeting for a portion of the property that Town Meeting authorized the Board to acquire, nor to issue bonds that were also authorized by Town Meeting for the purpose.

The Plaintiffs allege that the Board may rely on it having greater discretion to expand beyond what Town Meeting authorized because it was in litigation. In fact, however, the Board agreed to acquire a portion of the property Town Meeting specifically authorized to acquire – this can hardly be called unlawfully expanding what Town Meeting authorized.

F. Remaining Plaintiffs' Claims Do Not Show Substantial Likelihood Success On Merits

Article 97: The Complaint suggests that the terms of the Agreement violate Article 97 of the Amendments to the Massachusetts Constitution. Article 97 protects property that is held by municipalities for certain purposes, such as conservation, open space, and water supply protection, and such land cannot be used for an inconsistent purpose unless there is a two-thirds vote of the General Court. Plaintiffs overlook the plain fact, however, that Article 97 does not apply to any of the 155 acres because, at present, the Town does not own any of it. The Property cannot be dedicated as parkland, conservation or any other purpose until the Town actually

acquires it by deed. While the Board took steps to complete such acquisition via Chapter 61 and eminent domain, it has not done so and Article 97 is irrelevant at this time.

Chapter 61 Rollback Taxes: The Complaint alleges that the Town will pay the Trust's rollback taxes, as well as a survey of Parcel A and hydrogeological analysis for a potential public water supply. A hydrogeological study is not imminent, and the Town may need to seek a new appropriation if it determines such study is advisable. As for a survey of the property the Town is to acquire, a survey is commonly considered to be "costs incidental and related to" the acquisition of real property, and such costs were a part of the Special Town Meeting vote on Article 3. As to the rollback taxes pursuant to Chapter 61, preliminary settlement discussions include a waiver of such taxes, but this is not permitted under Massachusetts taxation statutes. As a result, the Settlement Agreement provides that the costs of the taxes will be reflected in the purchase price, but "the Defendant [Railroad] shall pay the full amount of the roll-back taxes to the Town." Therefore, neither the Town nor the Board are "paying" the rollback taxes.

Finance Committee Review: The Town bylaws do require that the Finance Committee review appropriation articles and make recommendations to Town Meeting (which Town Meeting may follow or disregard). This is exactly what the Finance Committee did at the October 24, 2020 Special Town Meeting, however, and there is no new appropriation required to carry out acquiring Parcel A.

Hopedale Foundation Donation: The Plaintiffs emphasize on the generous proposed donation the private Hopedale Foundation offered towards the purchase of the property prior to the Special Town Meeting. While the Complaint incorrectly characterizes the Foundation's February 24, 2021 letter as a rescission of its offer (the letter states that the Foundation will

"revisit" its decision), this still does not impact the issues in the Complaint or make any planned expenditure by the Town unlawful or in excess of its authority.

CONCLUSION

The Town and Board of Selectmen certainly acknowledge that the property acquisition spelled out in Settlement Agreement is different from what Special Town Meeting voted on and what the Board sought accomplish immediately after that Town Meeting, including filing suit against the Railroad and exercising the right of first refusal (made moot by the invalid notice and purchase and sale agreement submitted by the defendant One Hundred Forty Trust). During the Land Court litigation, however, it became clear to the Town that there was a substantial risk that it would lose rights to all the property, and two Land Court justices recommended mediation and resolution as well. As a result, the Board determined that what would serve the public interest the most would be to negotiate a settlement – pending a Town Meeting vote regarding Parcel D, the Town will be able to protect approximately 85 acres from development. As stated above, none of the actions of the Board at issue in this litigation exceeded the Board's legal authority or the parameters of what was voted by the Special Town Meeting. The Plaintiffs have failed to demonstrate either a substantial likelihood of success on the merits or that overturning the Settlement Agreement (which forms the basis of a Land Court final judgment) would in fact be in the public interest. The requested preliminary relief and injunction should be denied and judgment enter for the defendants.

Defendants,
TOWN OF HOPEDALE, LOUIS J. ARCUDI AND BRIAN R. KEYES,

By their attorney,

Brian W. Riley (BBO# 555385)
KP Law, P.C.
101 Arch Street
12th Floor
Boston, MA 02110-1109
(617) 556-0007
briley@k-plaw.com

Dated: March 9, 2021
753529/HOPD/0145

CERTIFICATE OF SERVICE

I, Brian W. Riley, hereby certify that on the below date, I served a copy of the foregoing Opposition of Defendants Town of Hopedale, Louis J. Arcudi, III and Brian R. Keyes to Plaintiffs' Motion for Preliminary Relief to Plaintiff by electronic mail, to the following:

David E. Lurie, Esq.
Harley C. Racer, Esq.
Lurie Friedman LLP
One McKinley Square
Boston, MA 02109
dlurie@luriefriedman.com
hracer@luriefriedman.com

David C. Keavany, Jr., Esq.
Christopher Hays Wojcik & Mavricos, LLC
370 Main Street, Suite 970
Worcester, MA 01608
dkeavany@chwmlaw.com

_____
Brian W. Riley

Dated: March 9, 2021

753529/HOPD/0145

EXHIBIT 3

KP | LAW
The Leader in Public Sector Law

101 Arch Street, Boston, MA 02110
Tel: 617.556.0007 | Fax: 617.654.1735
www.k-plaw.com

May 17, 2021

Brian W. Riley
briley@k-plaw.com

BY ELECTRONIC MAIL (dlurie@luriefriedman.com)
AND FIRST CLASS MAIL

David E. Lurie, Esq.
Harley C. Racer, Esq.
Lurie Friedman LLP
One McKinley Square
Boston, MA 02109

Re: Elizabeth Reilly, Carol J. Hall, Donald Hall, Hillary Smith, David Smith, Megan Fleming, Stephanie A. Mccallum, Jason A. Beard, Amy Beard, Shannon W. Flemming, and Janice Doyle v. Town of Hopedale, Louis J. Arcudi, Iii, Brian R. Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michale Milanoski, and One Hundred Forty Realty Trust
Worcester Superior Court C.A. No: 2185CV00238D

Dear Mr. Lurie:

In accordance with Rule 9A, enclosed herewith please find Response of Defendants Town of Hopedale and Hopedale Board of Selectmen to Plaintiffs' Motion for Judgment on the Pleadings and Cross-Motion of Town of Hopedale and Board of Selectmen for Judgment on the Pleadings and Memorandum of Defendants Town of Hopedale and Hopedale Board of Selectmen in Response to Plaintiffs' Motion for Judgment on the Pleadings and Cross-Motion for Judgment on the Pleadings, along with a Certificate of Service.

If you have any questions, or if you require further information, please do not hesitate to contact me.

Very truly yours,

Brian W. Riley

BWR/cqm
Enc.
cc: David C. Keavany, Jr., Esq.
764068/HOPD/0145

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238D

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILLARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMMING, and JANICE DOYLE,

Plaintiffs,

v.

TOWN OF HOPEDALE, LOUIS J. ARCUDI, III, BRIAN R. KEYES, GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, MICHALE MILANOSKI, and ONE HUNDRED FORTY REALTY TRUST,

Defendants.

RESPONSE OF DEFENDANTS TOWN OF HOPEDALE AND HOPEDALE BOARD OF SELECTMEN TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION OF TOWN OF HOPEDALE AND BOARD OF SELECTMEN FOR JUDGMENT ON THE PLEADINGS

The Defendants, Town of Hopedale and Board of Selectmen of the Town of Hopedale, hereby submit their Response to Plaintiffs' Motion for Judgment on the Pleadings, and Defendants further submit their Cross-Motion for Judgment on the Pleadings in this litigation. The Defendants rely upon their Memorandum filed herewith in support of their Response and their Cross-Motion.

Defendants,
TOWN OF HOPEDALE, LOUIS J. ARCUDI AND BRIAN R. KEYES,

By their attorney,

Brian W. Riley (BBO# 555385)
KP Law, P.C.
101 Arch Street
12th Floor
Boston, MA 02110-1109
(617) 556-0007
briley@k-plaw.com

Dated: May 17, 2021
763987/HOPD/0145

RULE 9C CERTIFICATION

On May 4, 2021, I conferred with each counsel of record and made a good faith effort to resolve or narrow the issues addressed in this motion.

Brian W. Riley

Dated: May 17, 2021

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238D

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILLARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMMING, and JANICE DOYLE,

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Defendants.

MEMORANDUM OF DEFENDANTS TOWN OF HOPEDALE AND HOPEDALE BOARD OF SELECTMEN IN RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants Town of Hopedale and Louis J. Arcudi, III and Brian R. Keyes, named in their capacity as members of the elected Hopedale Board of Selectmen (hereinafter "Town" or "Board"), hereby submit their opposition to the Plaintiffs' motion for judgment on the pleadings, and further move for judgment on the pleadings in their own favor. On October 24, 2020, a Special Town Meeting authorized the Board to acquire certain parcels of real property totaling approximately 130 acres, and further authorized the Town Treasurer, subject to the Board's approval, to issue bonds in the amount of $1,175,000 to pay for these parcels. The 130 acres were forested parcels that had been taxed pursuant to General Laws Chapter 61, giving the Town a right of first refusal if the owner (defendant One Hundred Forty Realty Trust, or "Trust") intended to sell or change the use of the property. Town Meeting also authorized acquiring an

additional 25 acres by eminent domain, and appropriated $25,000 to fund that taking. After the Special Town Meeting, the Board initiated an action in Land Court to prevent the remaining Defendants in this action (hereinafter referred to generally as "the Railroad" or "Railroad Defendants") from taking any actions regarding the property that would impact the Town's right of first refusal.

After a Land Court hearing on November 23, 2020, during which the Court (Rubin, J.) expressed skepticism as to the Town's ultimate ability to acquire the 155 acres (owned by the Trust, and effectively by the Railroad Defendants as beneficial interest holders), the Court issued a mediation screening order. Following mediation sessions before retired Land Court Justice Lombardi (who also expressed doubts as to the Town's likelihood of success against the Railroad and encouraged a settlement), the parties entered into a settlement agreement with the Railroad (hereinafter "Settlement Agreement," attached to the Verified Complaint as Exhibit 19), in which the Town would acquire approximately 64 acres of the property the Special Town Meeting authorized for acquisition, as well as an additional 20 acre parcel (Parcel D on Exhibit 1 to the Settlement Agreement) that will require a new vote of Town Meeting to authorize acceptance. The essence of the Plaintiffs' complaint, and its Motion, is that it would violate Massachusetts law for the Board to acquire <u>less</u> than the original 155 acres, or to spend less than $1,175,000 to acquire the entire 130 acres of property. While the Plaintiffs may oppose the Settlement Agreement in principal, there are no facts to support that the Town is illegally intending to carry out the provisions of the Settlement Agreement or unlawfully exercising its legal authority. The Town submits that it is entitled to judgment on the pleadings in its favor, and that Plaintiffs' motion for judgment on the pleadings should be denied.

FACTS AS PLED IN THE COMPLAINT

The Town accepts the following facts as true for purposes of this motion only.

1. This case involves 155 acres of undeveloped and forested property at 364 West Street, owned by the One Hundred Forty Realty Trust, 130 acres of which have been classified and taxed as forestland pursuant to G.L. c.61. Complaint, ¶14. While unstated in the Complaint, this property is zoned as an Industrial District.
2. The remaining 25 acres are not subject to Chapter 61. Complaint, ¶15.
3. In June 2020, the Trustee of the One Hundred Forty Trust negotiated a purchase and sale agreement with the Railroad Defendants to sell the 155 acres to the Railroad. The Trustee later assigned the beneficial interest in the property to the Railroad. Complaint, ¶¶ 23, 34.
4. While the Trustee provided notice of the P&S agreement to the Town, a trigger to the Town's right of first refusal for the forestland, the Board objected to the notice as defective in that it included the 25 acres that were not subject to Chapter 61, but further asserted its right of first refusal based on the assignment of the beneficial interest in the 130 acres to the Railroad. Complaint, ¶41.
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6. The second vote, on Article 5 of the warrant, authorized the Board to acquire the 25-acre parcel by eminent domain, pursuant to G.L. c.79, and appropriated $25,000 to pay for it. Complaint, ¶48 and Exhibit 12 to Complaint. Notably, the vote contained no qualifier that the Board must acquire all 25 acres.
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8. After the Town Meeting, for the purpose of seeking an order stopping the Railroad from clearing the forestland and to confirm its right of first refusal, the Town commenced an action in Land Court, Town of Hopedale v. Jon Delli Priscoli, Trustee of the One Hundred Forty Realty Trust, et al., 20 MISC 000467.
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11. As a result of the mediation, during which Judge Lombardi also encouraged a settlement, the Town and the Railroad reached an agreement to resolve both the Land Court litigation and the STB matter. The Settlement Agreement, attached to the Complaint as Exhibit 19, speaks for itself, but in summary, the Town will acquire Parcel A (approximately 64 acres), all of which was included in the Special Town Meeting's votes on Articles 3 and 5 of the October 24, 2020 warrant. The Railroad also agreed to donate Parcel D, approximately 20 acres, but since this was not part of the Special Town Meeting vote, a vote of Town Meeting is required in accordance with G.L. c.40, §14 to accept Parcel D.

ARGUMENT

A. Plaintiffs Misconstrue the Appeals Court Injunctive Order

The Town submits that throughout their Memorandum in support of its Motion for Judgment on the Pleadings, the Plaintiffs overstate both the breadth and intent of the Appeals Court injunctive order issued by Justice Meade, presenting it as strongly supporting all three Counts of the Complaint. In fact, however, the Order found only that the Plaintiffs had "shown a likelihood of success on the merits" as to whether the Special Town Meeting vote on Article 3 authorized acquisition of the 130 acres of Chapter 61 property, or whether it only appropriated funds for the 130-acre parcel but did not authorize acquisition.[1] That is the extent of the findings, and Justice Meade was careful to qualify the limited nature of his order:

> *For these reasons, I find that the plaintiffs have demonstrated some likelihood of success in establishing that the town's purchase of the land, pursuant to the settlement agreement, would be a statutory violation. To be clear, I am not deciding this case on the merits; only that the plaintiffs have demonstrated some chance of success on their claim.*

In addition, the Plaintiffs argue that because the Town took steps to exercise the right of first refusal and take title to the Chapter 61 parcel, this is irrevocable and the Board has no option but

[1] The Town respectfully submits that the Appeals Court Order is incorrect on this issue, see *infra*.

to take title to all 130 acres and, significantly, that no new Town Meeting vote to authorize acquiring the 64 acre parcel under the terms of the Settlement Agreement would be legal or effective. In fact, Justice Meade explicitly rejected that argument even in his narrow ruling: "Nothing in this memorandum and order should be construed as preventing the town from conducting a town vote authorizing the select board to purchase any or all of the land at issue, *which would render the transaction lawful*." (emphasis added). It is clear why the Plaintiffs are arguing so strenuously that the only conceivable outcome is the Town acquiring all 155 acres - because if there is a new Town Meeting vote pursuant to the Settlement Agreement, all of the Plaintiffs' claims in this litigation become moot, and Justice Meade took the extra step to make his view of the case clear to the parties.

B. The Town Meeting Vote on Article 3 Authorized Acquisition of the Chapter 61 Property

After the Superior Court denied their request for a preliminary injunction, the Plaintiffs sought review by a single justice in the Appeals Court, arguing (among other issues) that the October 24, 2020 Special Town Meeting vote on Article 3 did not in fact authorize the Board to acquire the 130 acre parcel pursuant to G.L. c.40, §14. Justice Meade agreed with this position, but did not decide whether the vote authorized acquisition pursuant to Chapter 61 either.[2] The Town respectfully submits that the Order is incorrect on this point. Article 3 stated in relevant part:

> To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less , located at 364 West Street… and in order to fund said acquisition, raise and appropriate, transfer from available funds, or borrow pursuant to G.L. c. 44, §7, or any other enabling authority, a sum of money in the amount of One

[2] Justice Means noted that neither party provided appellate decisions regarding whether G.L. c.61,§8 provides full authority for a town acquiring real property or whether such authority resides only in G.L. c.40, §14. The reason for this is plain – Chapter 61 is silent as to authority take title by deed or to appropriate funding to do so because that authority is found exclusively in G.L c.40, §14, and placing an article pursuant to G.L c.40, §14 to seek authority and funding to acquire virtually any real property has been a legal requirement for nearly a century.

> Million One Hundred and Seventy-Five Thousand Dollars ($1,175,000.00)… said property being acquired pursuant to a right of first refusal in G.L. c. 61, §8…

When the motion on Article 3 was made, it stated in relevant part "I move that the Town vote to appropriate the sum of [$1,175,000] to pay costs of acquiring certain property, consisting of 130.18 acres, more or less, located at 364 West Street,…". (emphasis added). The Town submits that the difference between the article and the motion is one of form and not substance. The article sought an appropriation in order to acquire certain identified property, and so did the motion. Both the Plaintiffs and the Single Justice conclude that the reason for the difference was that the 400 voters at Town Meeting, who unanimously approved the motion, were aware of the legal subtleties of G.L. c.61, §8 and that the Board exercising an option is the same thing as acquiring title by deed to real property (it plainly is not), and therefore only an appropriation was required to acquire title. This argument has no legal or practical support. There is realistically only one presumption that should be made for what the 400 voters thought they were doing on October 24, 2020 – they were being asked (in Article 3) to vote to acquire the 130 acres and to appropriate $1.175 million to pay for it, and they voted to do so.

C. The Board Has Legal Authority to Acquire Less than 155 Acres

While the Plaintiffs' include numerous facts and allegations that are not relevant to or determinative of the legal issues and outcome of this case, the Complaint may be summarized as two primary claims:

a) Since Town Meeting authorized the Board to acquire approximately 155 acres, 130 acres of which has been subject to G.L. c.61, the Board cannot lawfully acquire a lesser amount of property; and

b) The Board lacked authority to waive the Chapter 61 right of first refusal in the Settlement Agreement. This claim fails to allege a violation of G.L. c.40, §53, but the Board shall address it below.

The Board submits that, prior to the Land Court's directive to participate in mediation, it fully intended to acquire all 155 acres, and it exercised (or attempted to exercise) the authority granted by the Town Meeting votes to do so. During the course of the Land Court proceedings and mediation, however, the Board determined that pursuing its Land Court case to trial, as well as having to defend the Town's position before the Surface Transportation Board, would not only be prohibitively expensive but could well result in the Town receiving **none** of the 155 acres. The Board determined, therefore, that it would be substantially more in the public interest to resolve all litigation with the Railroad via the Settlement Agreement.

(1) The Board has Legal Authority to Acquire Less than 155 Acres.

The Plaintiffs allege that because the Special Town Meeting vote had such clear support to acquire all 155 acres at issue, the Board lacked legal authority to approve the Settlement Agreement and acquire approximately 85 acres – 40 acres that was subject to Chapter 61, 25 acres that was to be acquired by eminent domain, and another 20 acres (Parcel D on the plan attached to the Settlement Agreement as Exhibit 1) that was not involved in the Special Town Meeting votes. Notwithstanding the Complaint's allegations, however, there is no legal support for this allegation and the Settlement Agreement's terms do not violate G.L. c.40, §53.

In order for a town to acquire real property, there must be a favorable vote of Town Meeting pursuant to G.L. c.40, §14 to do so – a majority vote is sufficient if there are no funds being spent, but a two-thirds vote if there is an appropriation (the Special Town Meeting vote was recorded as unanimous). *See* Harris v. Wayland, 3932 Mass. 237, 238 and n.3 (1984). As

stated expressly in the Settlement Agreement, the Town may not accept the donation of the 20 acre "Parcel D" until there is a further Town Meeting vote to authorize it. As for the other approximately 65 acres, however, these parcels were already authorized by Town Meeting vote for acquisition, and there were no limiting conditions in such votes to restrict how the Board could exercise its authority. Massachusetts case law clearly establishes that while a Board of Selectmen cannot acquire property that was not authorized by Town Meeting, Town Meeting cannot compel the Board to complete such acquisition and the Board may legally acquire less property than authorized. See Russell v. Town of Canton, 361 Mass. 727 (1972).[3]

(2) The Board's Waiver of the Right of First Refusal was Valid.

As part of the Settlement Agreement, the Board agreed to waive its right to further exercise any right of first refusal the Town has pursuant to G.L. 61, §8. The Plaintiffs argue extensively that the Board has no authority to do so and that it was required to seek a further vote of Town Meeting, claiming that "those rights cannot be waived as a matter of law and there was no approval by Town Meeting to not exercise or waive those rights." Complaint, ¶121. The Plaintiffs have consistently misrepresented or misunderstood how Chapter 61, §8 works, as well as the fact that exercising a right of first refusal (or declining it) is an executive function that only a Board of Selectmen can accomplish. Chapter 61, §8 details the procedures when an owner of forestland being taxed under the statute intends to alter the use of the property (by the owner or a prospective new owner). This includes a notice and copy of the purchase and sale agreement submitted to the Town, triggering a right of first refusal for the Town that must be exercised within 120 days or the right is lost. The Land Court proceedings included the issue of whether

[3] In denying Plaintiffs' motion for preliminary injunction, the Superior Court (Frison, J.) found that Russell governed and demonstrated the lack of a likelihood of success on the merits of the Complaint. The Appeals Court (Meade, J.) found that "while Russell may guide in this case, it is not controlling."

the original notice to the Town was valid; however, as part of the settlement, the Board agreed not to seek to enforce the right of first refusal. [4]

The actual action that a municipality must take to exercise a right of first refusal is stated in §8 as follows:

> **This option may be exercised only after a public hearing followed by written notice signed by the mayor or board of selectmen, mailed to the landowner by certified mail at such address as may be specified in the notice of intent. Notice of the public hearing shall be given in accordance with [the Open Meeting Law].**
>
> **The notice of exercise shall also be recorded at the registry of deeds and shall contain the name of the record owner of the land and description of the premises adequate for identification of it.**

It is notable, of course, that neither these paragraphs, nor anywhere in §8, is there any reference to a vote of Town Meeting. This is because such exercise is, again, an executive action whose sole authority resides with the Board of Selectmen. If, for example, a Board of Selectmen receives a valid §8 notice for conversion of forestland, it may determine on its own that the Town should not acquire the property – it may either send written notice to the owner waiving the right of first refusal or simply allow the 120 days to run without acting. There is nothing Town Meeting or anyone else can do to exercise the right of first refusal in such a case. Before the Board can actually acquire property after exercising such right, however, it must obtain a vote of Town Meeting to authorize acquisition and appropriate funds – such vote is absolutely and solely governed by G.L. c.40, §14. But the right of first refusal itself is exclusive to the Board. As such, and so the Board may waive its authority to exercise such right and acquire property, even after initially voting to exercise it, and there is no case law precedent stating otherwise. Moreover, there is no reason that a Board of Selectmen cannot decide not to complete

[4] In its November 23, 2020 order, the Land Court (Rubin, J.) expressed significant doubt that the original notice from the Trust was effective, and therefore whether the 120 day exercise period ever began is also uncertain. Exhibit 16 to Verified Complaint.

a Chapter 61 (or eminent domain) acquisition at any point prior to actually paying for it and taking the deed if it determines that to be in the public interest.

The Plaintiffs argue that Chapter 61 contains no authority for a Board to waive the exercise of the right of first refusal, and therefore (1) the Settlement Agreement is illegal and (2) the Board is compelled to purchase the 130 acres. This is contrary to Massachusetts case law. The authority relied upon by Plaintiffs to claim that the Board cannot waive exercising the right of first refusal is inapposite, and actually states that a municipality cannot be held to have waived its right against its will. *See* Smyly v. Town of Royalston, Land Court, 2007 WL 2875942:

> In the instant case, this court disagrees with Plaintiff's argument that the Town waived its right to insist on statutory compliance upon its exercise of the option. Courts have consistently held that where the language of a statute sets forth strict, unambiguous procedural requirements, the court will not construe the statute in a manner for which no provision was made. See *Town of Billerica,* 66 Mass.App.Ct. at 668. Additionally, this court previously held with regard to G.L. c. 61A, which sets forth notice requirements identical to those in G.L. c. 61 § 8, that the statute does not provide for waiver of requirements, based on the reasoning that exceptions not provided for should not be read into the statute. *Id.* This court will not construe the statute to allow for waiver as this would be wholly inconsistent with the express language provided by the legislature and the prior holdings of this court. (*emphasis added*)

This holding is unrelated to a Board of Selectmen waiving its right of first refusal and/or to acquire Chapter land of its own volition. Moreover, neither Town Meeting nor ten taxpayers can compel a Board of Selectmen to complete a real property acquisition if the Board determines it is not in the Town's best interest. *See* Russell v. Canton, 361 Mass. 727, 730-32 (1972):

> One argument made by the plaintiffs is that the town vote expressly directed the board to take all of their land, and that the board had no discretion to take less than all of it. This argument is without merit. The selectmen are public officers whose powers and duties with reference to eminent domain are fixed by statute. It is questionable whether a town meeting vote can operate to direct or command them in the discharge of their duties…. We hold that the town could authorize the selectmen to take real estate by eminent domain, but that it could not direct or command them to do so. Although G.L.c. 40, § 14, requires that before land is taken by eminent domain the taking be authorized by a vote of the town, it vests the power to make the taking in the selectmen of the town. There is nothing in § 14 which makes such an authorization binding on the selectmen, or which

> prevents them from exercising their discretion and sound judgment in deciding whether to make a taking pursuant to the authorization. If the selectmen, being authorized by the town to make a taking, do not make it, the decision is not judicially reviewable as to its wisdom.

While Russell concerns a Town Meeting vote to acquire property by eminent domain, this principal applies equally to the right of first refusal in Chapter 61, §8. If the Board determines that circumstances mitigate against completing an acquisition of real property, neither Town Meeting nor a court may compel it to do otherwise. *See* Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508, 512 (1990):

> The role of the town manager or board of selectmen in the collective bargaining process is an essentially executive function mandated by statute. We have held that, when a board of selectmen is acting in furtherance of a statutory duty, the town meeting may not command or control the board in the exercise of that duty. *See* Russell v. Canton, 361 Mass. 727 (1972); Breault v. Auburn, 303 Mass. 424 (1939); Lead Lined Iron Pipe Co. v. Wakefield, 223 Mass. 485 (1916). These decisions reflect an application of the more general principle that "[a] municipality can exercise no direction or control over one whose duties have been defined by the Legislature." Breault v. Auburn, *supra* at 428, *quoting* Daddario v. Pittsfield, 301 Mass. 552, 558 (1938).

(3) It Is Not Unlawful For The Board To Agree To Expend $587,500.

Similar to the claims addressed above, the Plaintiffs allege that it is unlawful for the Board to agree to expend $587,000 for the 64 acres it is to receive by purchase pursuant to the Settlement Agreement, because Town Meeting appropriated $1,175,000 for the entire 130 acres and the Board may not agree to spend less. The Town first submits that the Plaintiffs' reliance in the Verified Complaint on the difference between how much the Town is paying per acre under the Settlement Agreement versus what the Railroad paid is a red herring; the two amounts were not negotiated on a per acre price and involve different purposes for acquisition, and the Town Meeting appropriation vote was a bottom line figure and not per acre. Moreover, the Settlement Agreement proposes the Town acquiring 20 acres that were never a part of the Special Town Meeting votes or the Land Court. Most importantly, however, whenever Town Meeting

appropriates funds – whether to acquire property, contract for services, or fund annual department operating budgets – the Town is not obligated to spend all of the appropriation, but it spends what is needed. Regardless of how the Plaintiffs feel about the Settlement Agreement terms, it is clearly not unlawful for the Board to authorize spending $587,000 of the amount appropriated by Town Meeting for a portion of the property that Town Meeting authorized the Board to acquire, nor to issue bonds that were also authorized by Town Meeting for the purpose.

D. Plaintiffs Lack Standing to Challenge the Land Court Settlement Agreement

The Town supports and agrees with the Motion for Judgment on the Pleadings being filed by the Trust and Railroad Defendants in this matter. The Town further submits that while the basis for this litigation pursuant to G.L. c.40, §53 is at least properly before this Court, the Plaintiffs lack both standing or credible arguments to challenge the validity or legality of the Land Court Settlement Agreement itself (Exhibit 19 to Verified Complaint). The Board filed the Land Court action to assert and confirm its right of first refusal pursuant to G.L. c.61, §8 (which the Railroad Defendants and the One Hundred Forty Realty Trust challenged), and to prevent the Railroad Defendants from performing any clearing of the subject property. As detailed *supra,* the parties had a hearing and two sessions of court-ordered mediation before Land Court justices. During this process, based on input from its legal counsel and Judge Lombardi, the Board ultimately concluded that its best chance of securing at least some of this important property was to reach a settlement with the One Forty Realty Trust and Railroad Defendants. This was a duly litigated lawsuit between the only parties in interest, it was resolved via a settlement agreement and joint stipulation of dismissal with prejudice, and both parties gave up interests that they claimed for their own in resolving the case (the Plaintiffs' claim that the Agreement is a void contract because the Town received no consideration is baseless).

As such, the Plaintiffs' attempt to collaterally attack the Settlement Agreement is not permissible and these claims in Counts I and II cannot prevail. See Barrington v. Dyer, 95 Mass. App. Ct. 1116 (2019) (unpublished):

> We affirm the judgment of the Superior Court dismissing the plaintiff's complaint for fraud. ***As the judge correctly recognized, the plaintiff's complaint constitutes an impermissible collateral attack on the judgment of the Probate and Family Court, entered upon the stipulation of dismissal, with prejudice, of the defendant's decedent's complaint for partition of certain real property. See Harker v. Holyoke, 390 Mass. 555, 558, 457 N.E.2d 1115 (1983); Fishman v. Alberts, 321 Mass. 280, 282, 72 N.E.2d 513 (1947). The plaintiff's contention that the stipulation of dismissal is invalid (because it was procured by fraud) does not require a different result; any such contention must be established by means of a motion in the Probate and Family Court for relief from the judgment entered on the stipulation, and not by a separate action in the Superior Court. See Mass. R. Civ. P. 60 (b) (3), 365 Mass. 828 (1974)***. Nor does the plaintiff's invocation of the recently enacted Uniform Trust Code affect the analysis; G. L. c. 203E, § 111, largely codified prior law, and in any event it does not authorize a collateral attack on a judgment of the Probate and Family Court based on a claim that the agreement on which it was based is invalid.

The Plaintiffs are unhappy with the results of the Land Court litigation and the terms of the Settlement Agreement. This does not, however, give them standing to "undo" the Agreement, which is the heart of what the Verified Complaint hopes to achieve. Even if, in order to carry out the Agreement, a new Town Meeting vote is required – which the Town does not concede or agree with – the Settlement Agreement itself is valid and does not exceed the Board's statutory executive authority, and the Plaintiffs' attempts to pursue their claims as if the Land Court proceedings themselves were illegitimate illustrates the futility of their arguments:

> By attempting to relitigate in the Superior Court the same claim on which judgment had previously been entered in the Housing Court, the plaintiffs have challenged the Housing Court judgment collaterally. If we were to permit such an attack as a general rule, the finality of judgments would be substantially impaired. This would not be in the best interests of litigants or the public. While it is important that judgments be rendered only by courts having the right to render them, it is also important that controversies be finally terminated after there has been full and fair litigation. As we observed in *Wright Mach. Corp.* v. *Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974), quoting *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931), "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the

> result of the contest, and that matters once tried shall be considered forever settled as between the parties." The public interest in enforcing limitations on courts' subject matter jurisdiction is ordinarily served adequately by permitting direct attack on judgments. Although there may be rare circumstances in which sound policy requires that finality give way to the enforcement of limitations on a court's authority by collateral attack, this is not such a case.

Harker v. Holyoke, 390 Mass. 555, 558-559 (1983).

E. Remaining Plaintiffs' Claims Do Not Show Substantial Likelihood Success On Merits

During the pendency of this litigation, the Plaintiffs have advanced numerous and often contradictory arguments. For example, the Plaintiffs state that the Town Meeting vote on Article 3 did not authorize the acquisition of any real property – but they then argue that said vote was sufficient to vest actual or quasi-title to the property, notwithstanding that the Town has not paid for any property and holds no deeds. They even argue that the Board committed an illegal "assignment" of its Chapter 61 rights to the Trust and Railroad, despite the fact that those parties are the owners of that property. Count III has other random arguments that the Town is entitled to judgment on, summarized below.

Article 97: The Complaint suggests that the terms of the Agreement violate Article 97 of the Amendments to the Massachusetts Constitution. Article 97 protects property that is held by municipalities for certain purposes, such as conservation, open space, and water supply protection, and such land cannot be used for an inconsistent purpose unless there is a two-thirds vote of the General Court to allow it. Plaintiffs overlook the plain fact, however, that Article 97 does not apply to any of the 155 acres because, at present, the Town does not own any of it. The Property cannot be dedicated as parkland, conservation or any other purpose until the Town actually acquires it by deed. While the Board took steps to complete such acquisition via Chapter 61 and eminent domain, it has not done so for the reasons discussed above – no deeds have changed hands, no compensation has been paid to the One Hundred Forty Realty Trust, and

the Board has waived its rights to pursue its current or future Chapter 61 rights. Therefore, Article 97 is irrelevant to the issues in the litigation.

Chapter 61 Rollback Taxes: The Complaint alleges that the Town will pay the Trust's rollback taxes, as well as a survey of Parcel A and hydrogeological analysis for a potential public water supply. A hydrogeological study is not imminent, and the Town may need to seek a new appropriation if it determines such study is advisable. As for a survey of the property the Town is to acquire, a survey is commonly considered to be "costs incidental and related to" the acquisition of real property, and such costs were a part of the Special Town Meeting vote on Article 3. As to the rollback taxes pursuant to Chapter 61, Massachusetts taxation statutes do not permit a waiver of such taxes. However, the Settlement Agreement provides that the costs of the taxes will be reflected in the purchase price, but "the Defendant [Railroad] shall pay the full amount of the roll-back taxes to the Town." Therefore, neither the Town nor the Board are "paying" the rollback taxes.

Finance Committee Review: The Town bylaws do require that the Finance Committee review appropriation articles and make recommendations to Town Meeting (which Town Meeting may follow or disregard). This is exactly what the Finance Committee did at the October 24, 2020 Special Town Meeting, however, and there is no new appropriation required to carry out acquiring Parcel A.

CONCLUSION

Throughout this litigation, the Plaintiffs have advanced a myriad of theories in hopes of prevailing in their claims – that the Board is not authorized to acquire the 130 acres under G.L. c.40, §14 but is under G.L. c.61, a statute that does not explicitly authorize acquisition; that the Board of Selectmen illegally "assigned" real property to the Railroad Defendants, in spite of not

owning said property; that the Board is violating Article 97 of the Massachusetts Constitution in conveying conservation property, although again with property the Town does not own; that the Board has an irrevocable and irreversible obligation to acquire the 130 acres, notwithstanding no vote authorizing acquisition and Massachusetts case law giving the Board the ultimate executive authority to decline to acquire real property; and even that the Town already legally and/or effectively owns the 130 acres, despite no purchase and sale agreement between the parties, no exchange of funds and no deed to said property changing hands. The Plaintiffs have also made veiled but clear insinuations that the Board has either been hoodwinked by the Railroad Defendants or are corruptly in league with them, allegations that are as slanderous as they are utterly without basis. Finally, the Plaintiffs approach their motion as if they have already been proven all claims, notwithstanding that the Appeals Court Single Justice found only that the Complaint presented a "substantial likelihood of success" on a single claim, i.e., that the October 24, 2020 Town Meeting vote on Article 3 did not actually authorize the Board to acquire **any** of the 130 acres.

Sifting through the chaff of Plaintiffs' claims to the single dispositive claim properly before this honorable Court, the Town submits that there are two potential outcomes to that claim:

(a) The October 24, 2020 Town Meeting votes authorized the Board of Selectmen to acquire the entire 155 acres of property at issue: The Town submits this is the proper result, and that in accordance with the Board's executive authority, proper statutory interpretation and the Supreme Judicial Court's reasoning in Russell v. Canton, the Board therefore had authority to enter into the Settlement Agreement as best promoting the public interest; or

(b) The October 24, 2020 Town Meeting vote on Article 3 did not authorize the Board to acquire the 130 acres of Chapter 61 forestland: The Town disagrees with this argument, but acknowledges that Appeals Court Justice Meade made this preliminary finding. If this honorable Court ages with that determination, the Town requests that this Court further agree with Justice Meade that a new Town Meeting vote to authorize the Board to make the acquisitions pursuant to the Land Court Settlement Agreement would "render the transaction lawful" and resolve all outstanding issues in this litigation.

In conclusion, therefore, the Town and Board of Selectmen submit that this litigation is ripe for resolution on cross-motions for judgment on the pleadings, and that judgment should enter in favor of the Town of Hopedale and Board of Selectmen on Counts I, II and III.

Defendants,
TOWN OF HOPEDALE, LOUIS J. ARCUDI AND BRIAN R. KEYES,

By their attorney,

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Dated: May 17, 2021
763544/HOPD/0145

CERTIFICATE OF SERVICE

I, Brian W. Riley, hereby certify that on the below date, I served a copy of the foregoing Memorandum in Response to Plaintiffs' Motion for Judgment on the Pleadings and Cross-Motion for Judgment on the Pleadings on behalf of the Defendants Town of Hopedale, Louis J. Arcudi, III and Brian R. Keyes, by first class and electronic mail, to the following:

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Dated: May 17, 2021

763544/HOPD/0145

EXHIBIT 4

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February 7, 2021

BY EMAIL AND CERTIFIED MAIL

Brian Keyes, Chairman
Board of Selectmen
Town of Hopedale
78 Hopedale St.
Hopedale, MA 01747

Re: Town of Hopedale's Right of First Refusal at 364 West Street And Settlement Term Sheet

Dear Mr. Keyes, Mr. Arcudi, and Ms. Hazard:

This firm represents at least ten taxpaying citizens of the Town of Hopedale ("Hopedale Citizens")[1] in relation to the Town of Hopedale's purported settlement of the Land Court lawsuit ("Settlement") commenced by the Hopedale Board of Selectmen ("BOS") against the Grafton & Upton Railroad ("GURR")[2]. The lawsuit relates to the Town's exercise of its right of first refusal to acquire certain forestlands at 364 West Street in Hopedale (the "Property").[3] The Hopedale Citizens request that the BOS cease and suspend any further action towards finalizing the purported Settlement with GURR because the Settlement Term Sheet prepared in mediation between the BOS and GURR is illegal and invalid for multiple reasons, namely, GURR is not the rightful property owner, it is in violation of the Town's right of first refusal pursuant to M.G.L. c. 61 and is an agreement to which the BOS has not been authorized to enter. We write to serve notice to the BOS that the Hopedale Citizens intend to sue the BOS pursuant to M.G.L. c. 40 § 53 (restraint of illegal expenditures) and c. 214 § 7A (prevent damage to the environment) in the event the BOS does not suspend its actions towards finalizing the Settlement pending independent review by outside counsel.

[1] The Hopedale Citizens include, without limitation, Elizabeth Reilly, Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

[2] GURR also includes Jon Delli Priscoli and Michael Milanoski.

[3] The Property is a total of 155.24 acres, including 130.18 acres classified as forest land pursuant to Chapter 61 and 25.06 acres of wetlands that are undeveloped and surrounded by the forest land. The Property is depicted as the center area, shaded orange on the map attached as **Exhibit 1**. Attached hereto as **Exhibit 2** is the plan of division attached and referenced in the Term Sheet.

Factual and Procedural Background

As the BOS is well aware, the Town has significant interest in the Property at 364 West Street. The Property consists of 155.24 acres of undeveloped forestland and wetlands, is contiguous with the Town's public parklands and is a valuable potential water source for the Town. Hopedale's Water and Sewer Commissioners, Finance Committee, Conservation Committee, Parks Department, and broad community all support protection and conservation of the entire Property through acquisition by the Town.

GURR has also long coveted the Property but for a different reason – to expand its rail system in Hopedale and construct a transloading facility. On June 27, 2020, the trustee of the Property entered into a P&S agreement with GURR for GURR to purchase the Property from the trustee for $1,175,000. Because 130.18 acres of the Property are subject to c. 61, Mr. Milanoski, on July 9, 2020, on behalf of the trustee, provided the Town with a Notice of Intent to Sell Forest Land Subject to Chapter 61 ("Notice") to be used for railroad transloading uses. The trustee's Notice included the entire Property in the purchase amount without separating out the purchase price of the 130.18 acres of c. 61 forestland from the 25 acres of wetlands.

The Town pointed out the potential error to the trustee while moving forward with the process of considering purchase of the Property. The Town expended significant resources and time considering whether to exercise its first refusal option, including hiring experts and conducting due diligence on the Property and its potential value to the Town for conservation, recreation and as a potential water source. The Town informed the trustee that it was considering exercising its first refusal option.

On October 7, 2020, a month before the Town's 120-day option period expired, the trustee purportedly withdrew its Notice, first disputing that the Notice was defective and then stating that the trustee "specifically withdraws its Notice of Intent to sell or convert the land that is currently in Forest Land subject to Chapter 61. Any further notice to sell or convert the land will be subject to a new notice of Intent." The Town correctly responded on October 8 that once a first refusal option ripens, it is irrevocable. The Town then continued to consider its first refusal option.

Just four days later, GURR orchestrated a series of conveyances designed to illegally seize control of the Property before the Town could exercise its first refusal option. On October 12, 2020, the trustee sold the entire beneficial interest in the 130.18 acres of the Property that is forestland protected under c. 61 to GURR for $1,175,000.[4] That same day, the trustees of the Property trust resigned and named GURR as the new trustees. By these actions GURR claimed control of the Property. Despite the representations by the former trustee that a new sale or transfer of the Property would be subject to a new notice of intent, the trustee failed to provide

[4] Also that same day, GURR separately purchased for $1.00 the Property's 25.06 acres of wetlands that are surrounded by the c. 61 forestland and an additional 20 acre parcel on the opposite side of West Street, at 363 West Street.

such a notice to the Town when it transferred 100% of the beneficial interest in and legal title to the Property to GURR.

On October 24, 2020, the Town held a Special Town Meeting, attended in person (despite Covid-19) by over 400 citizens of Hopedale. By unanimous votes, the Town approved two warrant articles relating to the Property, Articles 3 and 5. Article 3 authorized the Town to acquire, by purchase or eminent domain, the 130.18 acres of the Property subject to c. 61 and to appropriate $1,175,000 to acquire the forestland, either by exercise of its first refusal right or by an eminent domain taking. See Special Town Meeting Minutes, attached hereto as **Exhibit 3**. Article 5 authorized the Town to acquire by eminent domain the 25.06 wetland acres of the Property and appropriated $25,000 to do so. The BOS then voted to acquire the Property in accord with the Town Meeting authority.

On October 28, 2020, the Town sued GURR in Land Court to stop GURR's land clearing on the Property and to have a court rule on the validity of the Notice of Intent.

On November 2, 2020, the Town informed the trustees that the Town was exercising its first refusal option to purchase the forestland portion of the Property and that the Town was taking the 25 acres of wetland of the Property by eminent domain.

The court denied the Town's request for a preliminary injunction in a brief and narrow decision finding expressly that the Town is entitled to a right of first refusal but it is unclear whether or when that right has triggered or ripened:

> While **the Town is entitled to a right of first refusal under Chapter 61**, it is not clear whether an option period has been triggered and if so, when that occurred. The July 9, 2020 NOI appears to be defective because it encompassed both Chapter 61 forest land and another parcel of land without Chapter 61 protections, but did not include segregated valuations for each parcel. The NOI was defective because it did not provide adequate statutory notice to the Town of the cost to purchase the Chapter 61 land as required and therefore did not constitute a bona fide offer. (emphasis added)

Thus, the court held preliminarily that the only Notice of Intent served was defective, as the Town had initially indicated, because it included non-forestland with forestland in the Notice. But the court did not reach any of the other issues raised in the litigation by the Town or GURR, including whether federal railroad preemption trumped the Town's c. 61 rights. In January 2021, the Town and GURR engaged in two sessions of mediation, culminating in a Term Sheet that is a nullity because GURR is not the rightful property owner; the BOS was not authorized to agree to the terms; the Term Sheet is contrary to the Town Meeting's intent and vote; and the Settlement is not in the Town's interests.

The Term Sheet, among other things, would require the Town to pay $587,500 to GURR in exchange for only approximately 40 acres of the 130.18 acres of c. 61 forestland. The Town would also receive most of the 25 acres of wetland in the center of the forestland – 25 acres that GURR bought for less than $1.00. GURR would also give 20 acres of the separate non-forestland across the street, land that the Town Meeting did not consider or want and land that GURR got for the balance of the $1.00. In other words, the Town would pay approximately $14,687.50 per acre of forestland and get not even a third of the forestland to which it is entitled. Other egregious terms include the Town's obligation to support GURR's applications for state and federal grants; designation of the BOS as the sole decision-making body, a usurpation of the Water and Sewer Board's authority; a waiver of the Town's right of first refusal (which remains fully intact); and waiver of roll-back taxes that GURR would otherwise owe.

At bottom, GURR is not the rightful legal owner of the Property, the Town retains its right of first refusal option, and the Town has authorized an eminent domain taking of the entire Property from the Trust. The prior trustee's purported transfer of the beneficial interest in and legal title to the Property to GURR was itself illegal as in violation of Chapter 61 and the Town's right of first refusal. The prior trustee never gave the Town a Notice of Intent or 120 days to exercise its first refusal option on the transfer of the beneficial interest and title. GURR did not hold legal ownership to enter into the Term Sheet and the BOS was not authorized to agree to the terms.

1. The Term Sheet is a Nullity Because GURR is Not the Legal Owner of the Property and is in Violation of Chapter 61.

The Town fully exercised its first refusal option, within 120 days, on the only Notice of Intent it received. In addition, the Town, by unanimous Town Meeting vote, authorized an eminent domain taking of the Property from the rightful owner of the Property – which is not the railroad. If the first refusal option never ripened because Mr. Milanoski sent an invalid Notice of Intent to sell, the Town's first refusal right remains fully in effect and the Property remains subject to Chapter 61. A subsequent bona fide Notice of Intent was never served on the Town, leaving the first refusal right fully intact, rendering the railroad's purported take over and control of the Property illegal and null. GURR does not have legal ownership and control of the Property and cannot enter into a contract that governs the ownership of the Property.

Because the trustee did not serve a valid Notice of Intent to transfer use of the Property, the forestland remains subject to Chapter 61 and the Town's right of first refusal and there has been no event to implicate preemption. The Term Sheet is a nullity because it does not include the true owner of the land, treats the railroad as an unrestricted owner which it is not, and gives up c. 61 rights which BOS has no lawful basis to give up. See Town of Brimfield v. Caron, 2010 WL 94280, *10-11 (Mass. Land Ct. Jan. 12, 2010) (conveyance of forest parcel was a sale or conversion triggering the Town's right of first refusal pursuant to G.L. c. 61, §8; subsequent actions by Town and putative purchaser were therefore "a nullity") (cited by Judge Rubin in her

November 23, 2020 Order on the Town's Motion for Preliminary Injunction); after trial, 2015 WL 5008125 (2015) (ruling that Town had right to purchase forest lot for $186,500).

2. The Term Sheet is Illegal Because the BOS Does Not Have the Authority to Agree to Its Terms.

The Term Sheet is also illegal because the unanimous votes at Town Meeting authorized the BOS to acquire by exercise of its first refusal option and eminent domain, the full c. 61 forestland and wetland for conservation, recreation and potential water supply. The BOS did not have the authority to enter into a contract for an inferior fraction of the Property for the price set forth in the Term Sheet, or the outlying property which is primarily a dying pond and a liability for the Town. These terms are inconsistent and contradictory to the Town Meeting vote and are therefore invalid. See Faneuil Investors Group v. Board of Selectmen of Dennis, 458 Mass. 1, 9 (2010) ("the board may not include a provision that differs in substantial respect from that which the town meeting approved."). [5]

See also Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983), where the Appeals Court held that a perpetual encumbrance imposed upon six lots by a board of selectmen in an agreement for judgment, to the effect that the Town would cease to use the lots as a public parking area, in exchange for the property owner's abandonment of a challenge to the site plan approval for sewage pumping station, was beyond the authority of the selectmen, because it had not been approved by Town Meeting. The Court stated:

> [T]he perpetual encumbrance imposed upon the six lots by the selectmen was an action which they were powerless to take. The power to alienate and dispose of real estate lies with the inhabitants of the town acting at town meeting . . .
> . . .
> [T]he selectmen, offered as their part of the agreement for judgment a restriction that they lacked power to impose.
> . . .
> [If the restriction could not be challenged,] public officials could bind their governmental agencies to unlawful conduct by ready acquiescence in an agreement for judgment and, thus, circumvent the restrictions on their powers.

[5] See, also, Salem Sound Development Corporation v. City of Salem, 26 Mass. App. Ct. 396, 399-400 (1988) (lease executed by mayor was different in substantial respect from which city council had approved, and thus was unauthorized and unenforceable against city); City of Lawrence v. Stratton, 312 Mass. 517, 521-22 (1942) (mayor had no power to bind city by agreement with private citizens reducing from $50,000 to $40,000 the amount to be expended by citizens in reconditioning buildings on property which city council voted to convey); Reed v. City of Springfield, 258 Mass. 115 (1927) (appropriation for taking of land does not empower the taking where the specified land being taken is not described); Breckwood Real Estate Co. v. City of Springfield, 258 Mass. 111 (1927) (order of taking by board of aldermen without statutorily-required authorization or appropriation of money by city council was void); Govoni v. Town of Acushnet, 1995 WL 1146894, *3 (Mass. Sup. Ct. Nov. 17, 1995) ("[A]ny contract made by a town's board of selectmen without a specific appropriation to support it is invalid.").

Id. at 32-34 (emphasis added).

Here, the Term Sheet is substantially contrary to the authorizations by Town Meeting vote for acquisitions of the whole for parkland and public water supply. A comparison of the Property for which the Town Meeting approved acquisition compared to the parcels it would receive under the Settlement reveals how contradictory and inferior the Term Sheet is. Compare Exhibit 1 to Exhibit 2, the plan attached to the Term Sheet. Exhibit 1, produced as part of the Town's Due Diligence Report, shows that the Town voted to acquire 155 acres undeveloped land, including 130 acres of forestland and 25 acres of wetland, all contiguous with the Town's undeveloped parkland. The Town Meeting vote was clear, that the Town's acquisition of the Property would be made "to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes". The Town Meeting approved appropriating $1,175,000 to acquire the 130 acres of forestland and $25,000 to acquire the 25 acres of wetland.

In stark contrast, under the Term Sheet, the Town would get a mere 40 acres of forestland bordering 20+/- of wetland and a peripheral parcel encumbered by a dying pond that the Town never sought to acquire and the Town Meeting did not approve. Worse, the remaining 90 acres of forestland would be destroyed by the railroad's plans to clear the land for industrial uses, to construct sidetracks, yard tracks and other facilities designed to transport any number of hazardous materials. And the Town would be obligated to support the railroad's destruction of the undeveloped land.

Moreover, because the Town held the first refusal option on the entire c. 61 Property, under M.G.L. c. 40A, §3, a further Town Meeting vote would be required to give the majority of that Property to the railroad. See Bowers, supra.

None of this was ever authorized by Town Meeting and is well beyond scope of BOS authority. The BOS must abstain from finalizing these terms unless and until full review and Town Meeting vote can be had.

3. The Term Sheet Exceeds Other BOS Powers and Usurps Other Board Powers.

The Term Sheet also exceeds the BOS's authority in that it commits the Town to help the railroad apply for all state and federal grants in the future, agrees that the BOS will be the sole decision-making authority for matters involving the railroad, and agrees that the railroad will not be subject to local permitting by-laws. These commitments represent an unlawful abdication of the BOS's obligations to Hopedale residents and usurpation of powers belonging to other Town boards and committees.

With respect to the proposed obligation to help the railroad apply for all state and federal grants in the future, the BOS cannot lawfully commit to do that without knowing what those

applications for grants will entail and their implications on the Town and its residents. See Bowers, supra.

With respect to the proposed commitment that the BOS will be the sole decision-making authority for matters regarding the railroad, this exceeds the BOS's statutory authority and usurps the authority of other Town boards and commissions that may have statutory obligations to make decisions regarding the railroad, including without limitation the Finance Committee, the Board of Water and Sewer Commissioners, the Conservation Commission, and the Parks Commission.

With respect to the proposed commitment that GURR will not be subject to local permitting by-laws, the properties at issue will be subject to all local bylaws as a matter of law to the extent they are not properly owned by the railroad. Any properties properly owned by the railroad are still subject to local bylaws unless preempted as a matter of law. The extent of such preemption must be determined on a case-by-case basis, depending on the particular facts of the bylaw at issue and the circumstances of the railroad's operations. For example, protection of the public health and environment can never be abdicated.

Inasmuch as multiple provisions of the Settlement Term Sheet likely exceed the BOS's authority, it should not be approved until there is a thorough review by independent counsel of the legality of all of its provisions.

4. The Term Sheet is in Violation of Hopedale's Bylaws Requiring Finance Committee Review.

The Hopedale Finance Committee is required to "consider all Articles and Warrants for all Town Meetings and Referenda and shall report its recommendations before each meeting or vote in print or at a public meeting for that purpose." Hopedale Bylaws, § 79-3. The Finance Committee is also required to review and make a recommendation on all contracts exceeding $10,000. Id. §§ 79-8; 49-7. The Finance Committee was in favor of Warrant Article 3 at Town Meeting authorizing acquisition of 130.18 acres located at 364 West Street, "such acquisition to be made to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks Commission…" Indeed, the Hopedale Annual Report confirms that the Finance Committee Chairman informed residents that the Finance Committee "speaks favorably for this article." The Settlement Term Sheet, however, has not been approved by the Finance Committee. The Finance Committee has not approved its proposed (1) expenditure of $587,500 of Town funds to acquire approximately 64 acres, or (2) expenditure of unlimited funds to cover one half the surveying costs of five parcels of property. Accordingly, all provisions in the Settlement Term Sheet involving payments that require Town meeting approval or that risk exceeding $10,000 are unauthorized and are null and void. Loring v. Inhabitants of Town of Westwood, 238 Mass. 9,

11 (1921) (ten taxpayer action challenging wrongful expenditure valid, injunction appropriate, where even though town meeting had approved funds, local bylaw was not followed prior to the town meeting vote).

5. The Term Sheet Wrongfully and Illegally Usurps the Water and Sewer Commission's Authority.

The Hopedale Water and Sewer Commission ("Commission") has sole and "exclusive charge and control of the water department and water system." G.L. c. 41, § 69B. All "water rights" and "all works" shall be "managed, approved, and controlled" by the Commission. G.L. c. 40, § 39E. The Commission may exercise police powers to protect the water supply and watershed. G.L. c. 111, §§ 173A & 173B. The Town, through the Commission, "may develop and use any source of water supply within its limits," G.L.c. 40, § 38, and may acquire property to secure, protect, and expand the water supply, through eminent domain, purchase or otherwise. G.L. c. 40, § 39B. Section 39B vests this power in the Town's "board of water commissioners or selectmen authorized to act as such." Here, only the Commission has this power, as the BOS is not authorized under Town bylaws to act as a board of water commissioners. See Town Bylaws, §130-15 ("The Selectmen shall have the general direction and management of the property and affairs of the Town in all matters not otherwise provided for by law or these bylaws.") (emphasis added); §185-1 (establishing Commission).

Despite these and other clear mandates in the General Laws that confer vast powers upon the Commission, the BOS has voted to approve a Term Sheet that seeks to abrogate and impair the authority of the Commission. Specifically, the Term Sheet contains the following provisions relative to the water supply within the exclusive jurisdiction of the Commission:

(1) build a bridge over a waterway, install a public water supply well (¶¶ 1(b) and 4);
(2) commence activities for siting a new public water supply (¶ 2(a));
(3) establish conditions before new well testing may commence (¶ 2(b));
(4) limit the trust's obligations to ensure new well field complies with Department of Environmental Protection regulations (¶ 2(c));
(5) establish a funding formula to share costs of water testing (¶ 2(e));
(6) provide trust with "sole discretion" to install monitoring wells (¶ 2(f));
(7) record a deed relative to ground water protection (¶ 3(b));
(8) establish a "riparian buffer zone" (¶ 3(c));
(9) limit trust's notice to state and local authorities of development plans (¶ 3(d));
(10) establish deadline for town to identify "a financeable and feasible public drinking water supply well" (¶5 and ¶ 6(a));
(11) divest the Commission of any decision-making authority with respect to the trust and the railroad (¶ 6 (f)).

The Commission has not authorized these provisions or any other provisions in the Term Sheet. The BOS lacks authority to speak on behalf of the Commission or limit the powers of the Commission. Accordingly, all provisions in the Term Sheet involving current or future water rights of the Town of Hopedale are unauthorized and are null and void. See Walter v. Town of Provincetown, 61 Mass. App. Ct. 1109 (2004) (board of selectmen lacked authority to act as water commissioners under town charter).

6. The Term Sheet is in Violation of Article 97 of the Massachusetts Constitution.

The intent of the Town Meeting vote on Articles 3 and 5 was to obtain and preserve the Property as parkland. Because the Town voted to exercise its first refusal option and to take by eminent domain that land for parkland, such land is protected against any change in use by Article 97 of the Massachusetts Constitution. Under Article 97, municipal land devoted to parkland or public recreation or open space may not be changed to a different use without a 2/3 vote of the Massachusetts Legislature. An option to acquire such land is a sufficient ownership interest to trigger Article 97. Any sale of such land for other purposes, including railroad uses, would violate Article 97. See Smith v. City of Westfield, 478 Mass. 49 (2017); Perry v. Robbins, No. B00-0135, 2001 WL 1089484, at *1 (Mass. Super. Ct. Sept. 6, 2001). Article 97 is a law intended to protect the environment. Under G.L. c. 214, § 7A, ten citizens may commence an action for declaratory and injunctive relief for any actions causing damage to the environment in violation of laws protecting the environment. Sale of the properties and option rights at issue here to the Railroad, to be used for non-parkland purposes, violates Article 97 and is actionable under c. 214, §7A. Smith. Accordingly, we hereby demand that the Town cease and desist any sale, transfer, or abandonment of the Town's option rights under c. 61 for parkland. The BOS has 21 days to respond to this demand. If the BOS does not commit to cease abandonment of such rights, the Citizens will file suit in Superior Court to enforce compliance with Article 97.

Conclusion

The BOS must cease and desist from consummating this illegal and appalling deal to give time for meaningful review of its legality by outside counsel, the Finance Committee, the Conservation Commission, the Water and Sewer Commission, the Hopedale Citizens and all other stakeholders. Not only do the Town's first refusal rights remain fully intact and the Property subject to them, but the BOS is fully authorized and empowered to execute and record its eminent domain taking of the entire 155.24 acres of the Property. The BOS must pause the rush to finalize the Term Sheet and act to protect and preserve the forestland from utter destruction. The Property is not rightly owned or controlled by GURR and the Town retains power to acquire it and should proceed do so.

Very truly yours,

David E. Lurie

Harley C. Racer

Enclosures

cc: Peter F. Durning, Esq.
Diana Schindler, Hopedale Town Administrator
Hopedale Water and Sewer Board
Hopedale Conservation Commission
Hopedale Parks Department
Maura Healey, Massachusetts Attorney General

Exhibit 1

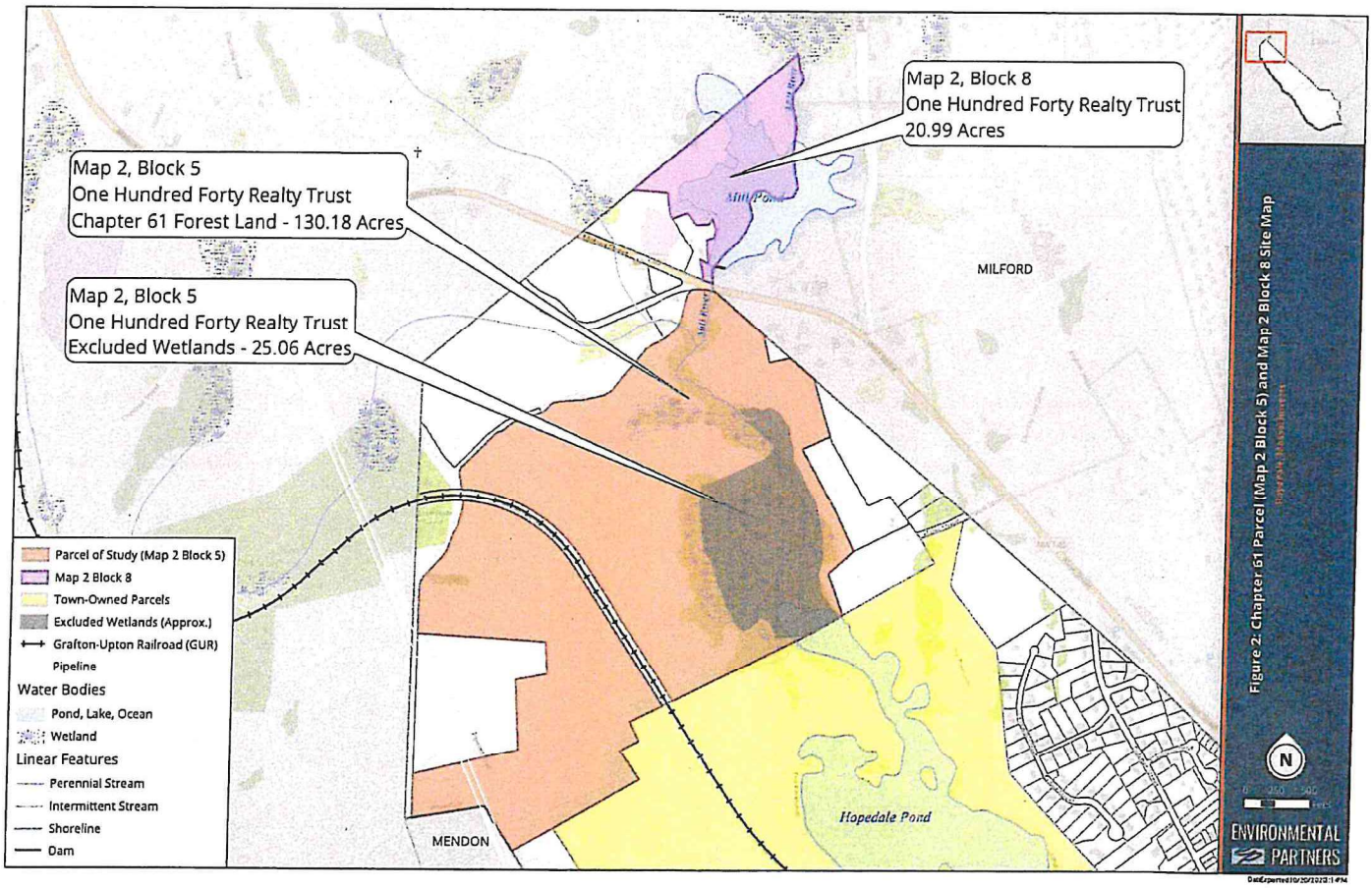
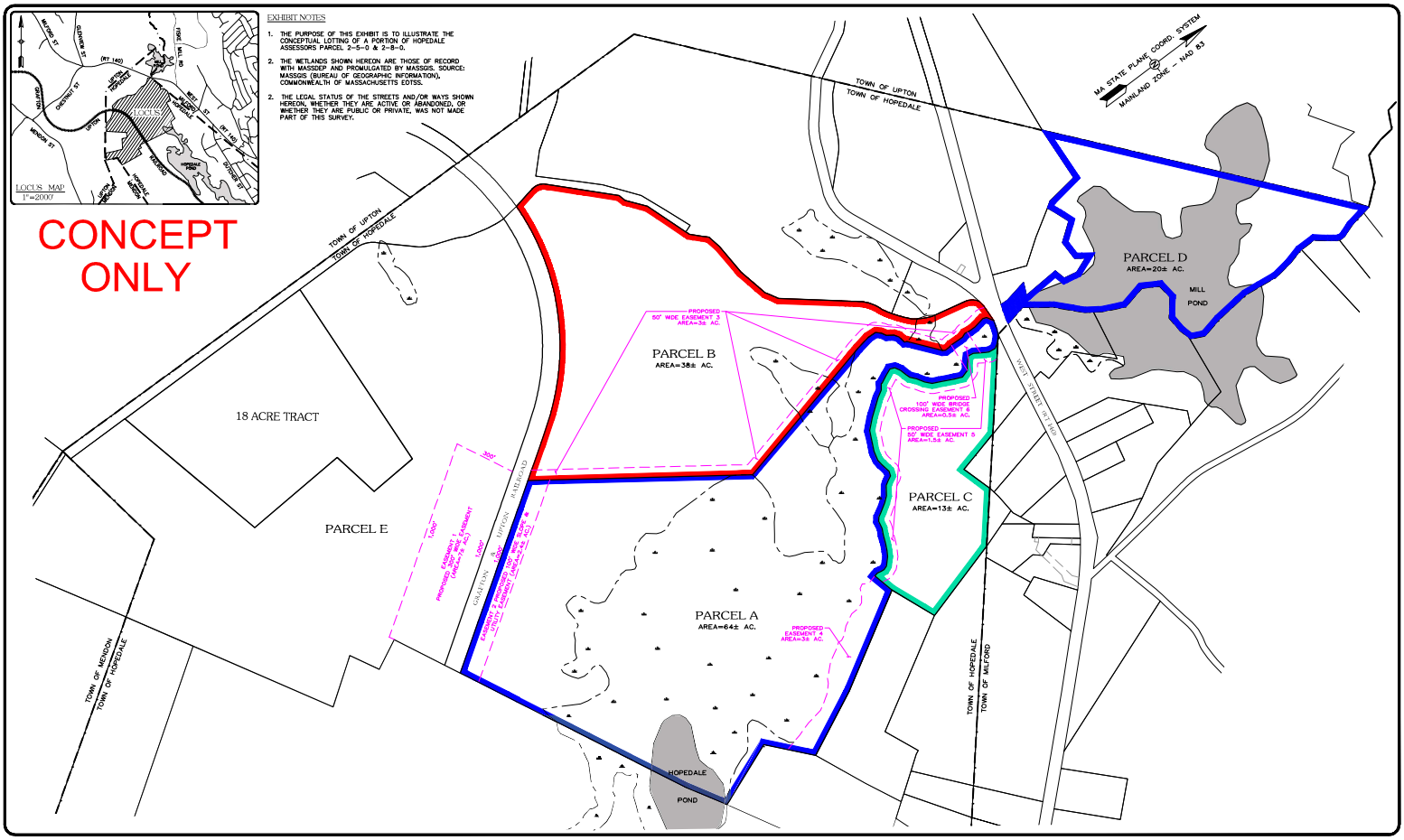

Map 2, Block 8
One Hundred Forty Realty Trust
20.99 Acres
Map 2, Block 5
One Hundred Forty Realty Trust
Chapter 61 Forest Land - 130.18 Acres
Map 2, Block 5
One Hundred Forty Realty Trust
Excluded Wetlands - 25.06 Acres
MILFORD
MENDON
Hopedale Pond
Parcel of Study (Map 2 Block 5)
Map 2 Block 8
Town-Owned Parcels
Excluded Wetlands (Approx.)
Grafton-Upton Railroad (GUR)
Pipeline
Water Bodies
Pond, Lake, Ocean
Wetland
Linear Features
Perennial Stream
Intermittent Stream
Shoreline
Dam
Figure 2: Chapter 61 Parcel (Map 2 Block 5) and Map 2 Block 8 Site Map
N
ENVIRONMENTAL PARTNERS

Exhibit 2



REVISIONS:

REV #	DATE	DESCRIPTION
0	1/26/21	ISSUED FOR AGREEMENT

DRWN BY: ZRB
CHK'D BY: PSB
APRVD BY: RML

Graphic Scale
1 inch = 200 feet
0 200 400 600

PREPARED BY:
Engineering Design Consultants, Inc.
32 Turnpike Road
Southborough, Massachusetts
(508) 480-0225

PROJECT:
GRAFTON & UPTON RAILROAD
364 WEST STREET
(WORCESTER COUNTY)
HOPEDALE, MASSACHUSETTS

TITLE:
CONCEPTUAL LAND DIVISION EXHIBIT

PREPARED FOR:
Grafton & Upton Railroad Company
42 Westboro Road
North Grafton, Massachusetts 01536

DATE:
JANUARY 26, 2021

1 OF 1

EDC PROJECT NUMBER
3659

3659 EXH CONCEPTUAL LOTTING R1.DWG

Exhibit 3

SPECIAL TOWN MEETING MINUTES
FISCAL YEAR 2021

SATURDAY, OCTOBER 24, 2020
1:00 P.M.

The inhabitants of the Town of Hopedale qualified to vote in elections and Town affairs met on the lawn of the Community House located at 43 Hopedale Street, Hopedale, MA 01747 on Saturday October 24, 2020. The meeting was called under the Warrant dated the 8th day of October 2020 which was posted in accordance with Town By-Laws. Moderator Eugene Phillips called the meeting to order at 1:30 PM. There were four hundred seven (407) registered voters recorded as present [a quorum being fifty (50) registered voters].

Moderator Eugene Phillips welcomed all residents and lead the Town Meeting in the Pledge of Allegiance and held a moment of silence for all that have passed before us.

Privileges of the floor were extended to the following:

Thomas M. Daige, Fire Chief
Mark Giovanella, Police Chief
Ann Williams, Professional Assessor
Brian Riley, Town Counsel
Karen Crebase, School Superintendent
Stephanie L'Etalien, Town Treasurer/Collector
Diana Schindler, Town Administrator
Peter Durning, Special Counsel
David and Laurie Mazzola 332 Mendon Street Upton, MA
Dave Sarkisian 225 Milford Street Upton, MA

Brian R. Keyes, Board of Selectman Chairman, addressed the residents with some opening remarks and stated he is grateful for the overwhelming presence on a Saturday, Outstanding!! He wanted to remind the residents that the Board of Selectmen have never lost sight of what they do, they serve the residents and have the best interest of the town in mind. Mr. Keyes feels the minority should also have an opportunity to speak even if not popular. The Board of Selectmen feel the Railroad is a budget issue and felt the residents voted against an override and had to make $700,000.00 in cuts but are willing to spend $1.5 million to do "something else." Mr Keyes also took a moment to recognize the various Departments for all their hard work.

A motion was made, seconded and carried to dispense the reading of the warrant.

ARTICLE 1: To see if the Town will vote to amend and balance the FY21 Omnibus Budget as voted in Article 7 of the July 21, 2020 Annual Town Meeting by transferring from available funds, appropriating available Overlay Excess, and reducing expenses by sums of money (to be outlined in Motion attachment); or to take any other action in relation thereto.

Christopher Hodgens, Finance Committee Chairman, moved to amend and balance the FY21 General Fund budget as voted in Article 7 of the July 21, 2020 Annual Town Meeting by appropriating the total sum of $25,021,104, as presented in budget top sheet and by using $160,000 from Overlay Excess, transferring $389,565 from Ambulance Receipts Reserved, transferring $492,543 from Water Enterprise Receipts and transferring $545,936 from Sewer Enterprise Receipts.
The motion was seconded and carried unanimously.

ARTICLE 2: To see if the Town will vote to raise and appropriate, transfer from available funds, or borrow pursuant to G.L. c. 44, §7, or any other enabling authority, the sum of Two Hundred Eighty-Two Thousand Six Hundred Ninety-Three Dollars ($282,693), or any other amount, to pay costs of updating and replacing streetlights, and for the payment of all other costs incidental and related thereto; or to take any other action in relation thereto.

Louis J. Arcudi III, Board of Selectmen, moved to appropriate, the sum of Two Hundred Eighty-Two Thousand Six Hundred Ninety-Three Dollars ($282,693) to pay costs of updating and replacing of streetlights, and for the payment of all other costs incidental and related thereto, and that to meet this appropriation, the Treasurer, with the approval of the Board of Selectmen, is authorized to borrow said amount under and pursuant to G.L. c. 44, §7(1) or pursuant to any other enabling authority, and to issue bonds or notes of the Town therefor. Any borrowing pursuant to this vote shall be reduced to the extent of any incentive payments received by the Town from MassSave on account of this project. Any premium received upon the sale of any bonds or notes approved by this vote, less any such premium applied to the payment of the costs of issuance of such bonds or notes, may be applied to the payment of costs approved by this vote in accordance with G.L. c. 44, §20, thereby reducing the amount authorized to be borrowed to pay such costs by a like amount.
The motion was seconded and carried unanimously

ARTICLE 3: To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less, located at 364 West Street, being a portion of that land described in an instrument of redemption of tax title taking recorded with the Worcester South District Registry of Deeds in Book 61533, Page 78, and shown on a sketch plan on file with the Town Clerk, and in order to fund said acquisition, raise and appropriate, transfer from available funds, or borrow pursuant to G.L. c. 44, §7, or any other enabling authority, a sum of money in the amount of One Million One Hundred and Seventy-Five Thousand Dollars ($1,175,000.00), and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, said property being acquired pursuant to a right of first refusal in G.L. c. 61, §8, which right is subject to exercise by a vote of the Board of Selectmen, such acquisition to be made to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks Commission, and

further to authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article; or to take any other action in relation thereto.

Brian R. Keyes, Board of Selectman Chairman, moved to appropriate, the sum of One Million One Hundred Seventy-Five Thousand Dollars ($1,175,000), to pay costs of acquiring certain property, containing 130.18 acres, more or less, located at 364 West Street, being a portion of that land described in an instrument of redemption of tax title taking recorded with the Worcester South District Registry of Deeds in Book 61533, Page 78, and shown on a sketch plan on file with the Town Clerk, and for the payment of all other costs incidental and related thereto, and that to meet this appropriation, the Treasurer, with the approval of the Board of Selectmen, is authorized to borrow said amount under and pursuant to G.L. c. 44, §7(1) or pursuant to any other enabling authority, and to issue bonds or notes of the Town therefor. Any borrowing pursuant to this vote shall be reduced to the extent of any grants or gifts received by the Town on account of this acquisition from the Hopedale Foundation. Any premium received upon the sale of any bonds or notes approved by this vote, less any such premium applied to the payment of the costs of issuance of such bonds or notes, may be applied to the payment of costs approved by this vote in accordance with G.L. c. 44, §20, thereby reducing the amount authorized to be borrowed to pay such costs by a like amount.

Christopher Hodgens, Finance Committee Chairman, informed residents the Finance Committee speaks favorably for this article. Mr. Hodgens publicly thanked the Hopedale Foundation for its generous pledge of covering $750,000.00, nearly half the cost of acquiring the property. Becca Solomon, Conservation Commission Chairman, Attorney Peter Durning, Special Counsel, Ed Burt Water and Sewer Chairman, and resident Glenda Hazard also spoke in favor of the article. After presentations from all, the motion was made, seconded and carried unanimously

ARTICLE 4: To see if the Town will vote to acquire, by purchase or eminent domain, for the purpose of public park land, the land located at 364 West Street which is not classified as forest land under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less, being a portion of that land described in an instrument of redemption of tax title taking recorded with the Worcester South District Registry of Deeds in Book 61533, Page 78, and shown on a sketch plan on file with the Town Clerk, and in order to fund said acquisition, appropriate from Free Cash, or raise from the current tax levy, or borrow pursuant to G.L. c. 44, §7 of the General Laws, or any other enabling authority, a sum of money, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, and further to authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article; or to take any other action in relation thereto.

Louis J. Arcudi III, Board of Selectmen, moved to pass over.

ARTICLE 5: To see if the Town will vote to take by eminent domain pursuant to Chapter 79 of the General Laws, for the purpose of public park land, the land located at 364 West Street which is not classified as forest land under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less, being a portion of that land described in an instrument of redemption of tax title taking recorded with the Worcester South District Registry of Deeds in Book 61533, Page 78, and shown on a sketch plan on file with the Town Clerk, and in order to fund said acquisition,

appropriate from Free Cash, or raise from the current tax levy, or borrow pursuant to G.L. c. 44, §7 of the General Laws, or any other enabling authority, a sum of money, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, and further to authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article; or to take any other action in relation thereto.

Louis J. Arcudi III, Board of Selectmen, moved to purchase, or take by eminent domain pursuant to Chapter 79 of the General Laws, for the purpose of public park land, the land located at 364 West Street which is not classified as forest land under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less, being a portion of that land described in an instrument of redemption of tax title taking recorded with the Worcester South District Registry of Deeds in Book 61533, Page 78, and shown on a sketch plan on file with the Town Clerk, and in order to fund said acquisition, borrow pursuant to G.L. c. 44, §7 of the General Laws, or any other enabling authority, the sum of $25,000, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, and further to authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article.

The motion was seconded and carried unanimously.

ARTICLE 6: Article Presented by Petition

To see if the Town will vote to exercise its option to purchase the 155.24 acres of land of Charles E. Morneau, Trustee, as represented in the Notice of Intent to Sell served on July 9, 2020, and to authorize the Board of Selectmen to act for the Town in taking all actions necessary to exercise said option and effectuate the acquisition; and further, to fund acquisition, to appropriate a sum of money in the amount of $1,250,000, or other sum, and to determine how such sum shall be raised, whether from the current tax levy, by transfer from available funds, or by borrowing said sum pursuant to the provision of Chapter 44 of the General Laws; or to take any other action in relation thereto.

Resident, Liz Riley, made a motion to pass over this article which was seconded and carried unanimously.

Eugene Phillips thanked the town residents and town officials for their attendance. A motion to dissolve the Warrant was made, seconded and carried. Meeting was dissolved at 2:31 pm.

A True Record
Attest:
Lisa M. Pedroli

Lisa M. Pedroli, Town Clerk

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.20MISC 00467

TOWN OF HOPEDALE	)	
	)	
Plaintiff	)	**DEFENDANTS' SUR-REPLY**
vs.	)	**TO PLAINTIFF'S MOTION TO**
	)	**VACATE STIPULATION OF**
GRAFTON & UPTON RAILROAD COMPANY, et al.	)	**DISMISSAL WITH PREJUDICE**
	)	
Defendants	)	

The G&U Defendants respectfully request that this Court accept this brief sur-reply in response to two issues raised in the Town of Hopedale's Reply in Support of its Motion to Vacate.

I. The Citizens Suit Did Not Nullify the Settlement Agreement.

The Town continues to press, without citation to any case law, its demonstrably incorrect position that the Superior Court's dicta in the Citizens Suit invalidated the Settlement Agreement between it and the G&U Defendants. This position must be rejected because ten taxpayers who were not a party to the Settlement Agreement had no standing to seek a declaration that the agreement is invalid. Only the parties to a contract may seek to invalidate a contract. Two of the three parties to the Settlement Agreement were not subject to Count I – the only Count of the Citizens Suit on which the ten taxpayers prevailed. The only count of the Citizens Suit asserted against the G&U Defendants was Count II and the G&U Defendants prevailed on Count II. The effect of the Citizens Suit is limited to the judgment that entered "enjoining the Board of Selectmen and the Town of Hopedale from purchasing land as set forth in the Settlement Agreement…" Judgment (emphasis added). The Superior Court's characterization of the Settlement Agreement

as "not effective" did not appear in the judgment, nor was it deemed an order or ruling of the court. It was mere dicta that cannot bind the parties to that agreement in a different case.

In Peter v. Sacker, 271 Mass. 383, 386 (1930), the Supreme Judicial Court considered a dispute between husband and wife over the possession of real estate. The trial court issued an order for a decree in favor of the husband but which also included language that the wife maintained a right to possession of part of the premises. The final decree did not include the language with respect to the wife's right to possession. The SJC held that "the statement in the order for decree does not help" the wife, because the decree itself only gave the possessory right to the husband. It stated that "[t]he decree is the final decision, and although it differed from the 'findings, rulings and order for decree,' it is final and by it the rights of the parties were determined." Id. (citation omitted). In a more recent case, the Appeals Court noted that Mass. R. Civ. P. 58(a) requires a judgment in a separate document, and that the separate judgment must be "self-sufficient, complete, and describe the parties and the relief to which the party is entitled." Creedon v. Haynes, 90 Mass. App. Ct. 717, 720 n.9 (2016), quoting Mullane v. Chambers, 333 F.3d 322, 336 (1st Cir. 2003). Here, the Superior Court's judgment enjoining the Town from purchasing land – and not its Memoranda setting forth additional reasoning – is the self-sufficient and complete document by which the rights of the parties were determined. This document did not declare the Settlement Agreement ineffective, or invalid.

There is good reason why only the judgment is binding here. The ten-taxpayers did not request that the Settlement Agreement be rendered "not effective," and again, had no standing to do so. The Town made no claim to render the agreement "not effective" – rather, it argued that the agreement would survive a judgment in favor of the ten taxpayers on Count I, the only claim on which the ten taxpayers succeeded. Moreover, a characterization of the agreement as currently not

effective makes no sense in context – the Town already waived its G.L. c. 61 rights and already released its claims against the G&U Defendants. In short, the Superior Court made an ineffective characterization in relation to an issue that was not in dispute and was not fully briefed or argued, and it did so in a manner (dicta) that is not subject to appeal.[1] To substitute dicta in the place of an appealable judgment specifically setting forth the rights of the parties and the status of the Settlement Agreement would be patently unfair and contrary to law.

II. The Town's Unsupported Arguments on Consideration Must be Rejected.

Contrary to the unsupported arguments advanced by the Town, there is overwhelming evidence and legal authority that the agreement does survive without the transfer of Parcel A. First, it is black-letter law that "a promise for a promise constitutes consideration." Carlson v. Trudeau & Trudeau Assocs., No. 05-3815 BLS1, 2006 Mass. Super. LEXIS 97, at *7-8 (Feb. 22, 2006), citing Graphic Arts Finishers, Inc. v. Boston Redevelopment Authority, 357 Mass. 40, 42-43 (1970). Although the Town – without authority – minimizes that the parties to the Settlement Agreement acknowledged receipt and sufficiency of the promises contained therein, such language is dispositive of the Town's Motion on its own. The court in Carlson found similar language sufficient to uphold a release, stating, "Carlson—not an uneducated man—[..] states that he has received valuable consideration. He will be taken at his word." Here, the Town, a sophisticated party represented by sophisticated counsel, acknowledged the G&U Defendants' promise to transfer land, among other promises, to be sufficient consideration for its waiver and release of its G.L. c. 61 claim. The Town must be taken at its word.

[1] The Town faults the G&U Defendants for not appealing, but the only Count asserted against these defendants was Count II and they prevailed on Count II.

The Town and its lawyer must be taken for their word on another issue. The Board of Selectmen meeting minutes of the January 25, 2021[2] public hearing regarding the decision to resolve this case include the following statement:

> "Attorney Durning stated that the core principals [sic] guiding the negotiation solution were protecting the Mill River watershed[...], securing opportunities for the exploration and development of new public water supply sources, owning or controlling the greatest amount of the forest land possible and preserving it as conservation land, and obtaining concessions for GU RR that would promote local control and/or the application of state and local rules and regulations on railroad parcels to the greatest extent possible to promote protection of the watershed and to preserve the ability to develop future water supply."

The Town's current (unverified and unsupported) position that "The land was the material inducement to the Settlement Agreement" (Reply, p. 3) (emphasis added) is in direct contrast to counsel's prior statement that the land acquisition was but one of several "core principles." The Settlement Agreement includes numerous concessions and benefits designed to meet these core principles regardless of whether the Town chooses to acquire the land. See Exhibit 1 hereto and Exhibit 4 to the Milanoski Affidavit, filed on January 18, 2022 (Minutes of the February 8, 2021 Board of Selectmen public hearing).

It is also black-letter law that a contract involving exchanges of multiple promises may survive if one of those promises is held to be unenforceable or invalid. See 1 Corbin on Massachusetts Contracts § 5.03 (2021) ("When the consideration requires more than one promise of different performances, if one of the promises cannot be enforced because it is invalid, the remaining valid consideration may still support the other party's promise"); see also Moody v. Weymouth, 276 Mass. 282, 288 (1931) ("…in other paragraphs the plaintiff obligates himself to other responsibilities and liabilities. The contract is not entire in the sense that the plaintiff's whole agreement was to guarantee seven per cent per annum on the cost of construction for a period of

[2] A true and accurate copy of the January 25, 2021 Board of Selectmen minutes are attached hereto as Exhibit 1.

five years. By its terms the contract was separable, and must be so construed."). Here, even if one of the promises in the Settlement Agreement is unenforceable or invalid – a fact which is not conceded, because through no fault of the G&U Defendants the Town has chosen not to seek appropriation for its land acquisition – the remainder of the agreement is enforceable and supported by consideration. The Town is a sophisticated party, represented by sophisticated and experienced counsel and could have made its release and waiver contingent upon consummation of its land acquisition. It chose instead to make the Settlement Agreement severable. The Court should not relieve the Town of the consequences of its own decisions because it is no longer satisfied with its agreement.

For the above reasons, and the reasons set forth in the G&U Defendants' initial Opposition, the Town's Motion should be denied.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST,

/s/ Donald C. Keavany, Jr.
Donald C. Keavany, Jr., BBO# 631216
Andrew P. DiCenzo, BBO# 689291
Christopher Hays, Wojcik & Mavricos, LLP
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CERTIFICATE OF SERVICE

I hereby certify that this document filed by email on January 24th, 2022 will be sent by separate email to.

Peter F. Durning, Esq.
Peter M. Vetere, Esq.
Mackie Shea Durning, P.C.
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/s/ *Donald C. Keavany, Jr.*

EXHIBIT 1

Board of Selectmen
January 25, 2021
Regular Minutes

Chair Keyes called the meeting to order at 7:00PM

Pledge of Allegiance

Consent Items
Per M.G.L. Chapter 44, §53E; Accept Donation for 364 West Street Legal Fees in the amount of $76,348.54 from Anonymous Donor
The Board of Selectmen thanked the Anonymous Donor for the generous donation.
Selectman Arcudi made a motion to accept the donation of $76,348.54 for 364 West Street Legal Fees. Selectman Hazard seconded the motion.
Arcudi – Aye, Hazard – Aye, Keyes – Aye

Appointments and Resignations
Resignation of Richard Bekerian from the Hopedale Police Department, effective January 29, 2021. (Letter Attached)
Chair Keyes read the letter provided by Richard Bekerian. Chair Keyes thanked Richard for his time and hard work with the Hopedale Police Department and stated that this is a big loss for Hopedale. Police Chief Giovanella also thanked Richard for his time with the Police Department. Chief Giovanella stated that with this loss the Police Department will be understaffed within 4-5 months, even with recently appointed employees.
Selectman Hazard moved to accept the resignation of Richard Bekerian from the Hopedale Police Department, effective January 29, 2021. Selectman Arcudi seconded the motion.
Hazard – Aye, Arcudi – Aye, Keyes – Aye

Reappointment of Carole Mullen to the MWRTA Advisory Board for the Town of Hopedale. (Letter Attached)
Chair Keyes read the letter provided by Carole Mullen. The Board of Selectman thanked Carole for her hard work and involvement.
Selectman Arcudi made a motion to reappoint Carole Mullen to the MWRTA Advisory Board for the Town of Hopedale. Selectman Hazard seconded the motion.
Arcudi – Aye, Hazard – Aye, Keyes – Aye

Public Hearing
7:15 p.m. Complete Streets Policy
To hear public comments and receive input on Draft Hopedale Complete Streets Policy
Selectman Arcudi made a motion to open the public meeting at 7:18PM on the Complete Streets Policy. Selectman Hazard seconded the motion.
Arcudi – Aye, Hazard – Aye, Keyes – Aye

Present: Eli Road Commissioner. Town Administrator began the discussion regarding the Complete Streets Policy. Town Administrator explained the Complete Street Policy that the Board of Selectmen will be reviewing at tonight's meeting. Town Administrator Schindler stated that most of the policy will be guided by the Road Commissioners because it is a road and streets policy primarily although this policy is not automobile centric (sidewalks, bike pathways, etc). The Town would also incorporate other decision makers in the policy such as the Schools, COA, the ADA Coordinator, the Parks Committee, or the Board of Selectmen.

Road Commissioner Eli LAST NAME asked Town Administrator Schindler that if the Road Commissioner's currently have projects open or had upcoming projects for the next year, that are going to be funded by Chapter 90 funds but if the funding from Chapter 90 runs out, would the Complete Streets Policy cover the funding that is needed? Town Administrator Schindler stated that we can augment the Chapter 90 funds with the Complete Streets Policy funds if it fits the criteria of Policy. How quickly the Complete Street funds are available is unknown.

Selectman Arcudi asked if we are adopting this Policy late and does that effect the Towns chances of being awarded funding? Town Administrator Schindler responded that over 200 MA communities have adopted the policy. The program is competitive, getting certified and obtaining the technical assistance funding is not competitive. The construction grants however, are competitive. Town Administrator Schindler clarified that this Policy is for public ways, not private ways.

Selectman Arcudi asked if a developer comes to Hopedale, would we enforce this Policy and make sure the developer is following the DOT guidelines? Road Commissioner Eli LAST NAME stated that Hopedale is currently enforcing DOT guidelines. However, with the policy in place, stricter guidelines may be enforced.

Selectman Arcudi stated that he wants to be sure that we will not be hindering development of Hopedale because of this policy and the infrastructure of the Town, he stated that some areas do not have the space for three lanes or bike paths. Town Administrator Schindler responded that there are exemptions included in the Policy that confirm that the Town/Developers will not be forced to do/add something if the costs are going to be disproportionate to the need or use.

Chair Keyes open the discussion for public comments.
A resident asked what the process is for notifying the town if there is a problem wit h the sidewalks and with the new policy, how to handle it? Town Administrator stated that the notification process remains the same, call the Highway Department. Town Administrator responded to the resident and stated that once this Policy is adopted, we want to get as much information as we can so we can add this information to the prioritization plan.

Selectman Hazard moved to close the Complete Street Public Hearing. Selectman Arcudi seconded the motion.
Hazard – Aye, Arcudi – Aye, Keyes – Aye

Selectman Hazard moved to adopt the Complete Streets Policy as presented. Selectman Arcudi seconded the motion.
Hazard – Aye, Arcudi – Aye, Keyes – Aye

The Public Hearing dissolved at 7:35PM

New Business*
7:45 p.m. Joint Meeting per M.G.L. Chapter 41, §11, with remaining Planning Board members, to consider Appointment of Kaplan Hasanoglu

Stephen Chaplin, member of the Planning Board, called the joint meeting to order at 7:46PM.

Stephen Chaplin thanked Kaplan Hasanoglu for his interested in the Hopedale Planning Board and stated that he will bring a lot to the Board. The Board of Selectmen expressed their enthusiasm regarding Kaplan being accepted as a member to the Planning Board.

Eli Leino made a motion to accept Kaplan Hasanoglu as a member to the Planning Board. Steven Gallagher seconded the motion.
Chaplin – Aye, Leino – Aye, Gallagher – Aye, Hazard – Aye, Arcudi – Aye, Keyes – Aye

Eli Leino made a motion to adjourn the meeting of the Planning Board. Steven Gallagher seconded the motion.
Leino – Aye, Gallagher – Aye, Chaplin – Aye

Old Business
COVID Updates
Town Administrator Schindler stated that the Governor is easing on restrictions. Beyond Full, the restaurant located in the Town Hall, will be permitted to open for in house dining beginning on February 1, 2021. There will be a limited number of patrons allowed, and masks must be worn when not consuming food/beverage. Town Administrator Schindler stated that the is working with Hopedale Health Agent, Bill Fisher, to ensure that the Town Hall has good cleaning and disinfecting of all shared facilities. Town Administrator Schindler stated that at the next Department Heads meeting, they will be discussing opening the Town Hall for limited regular hours to the public. Currently, residents must make an appointment to come into the Town Hall.

Mediation Updates; *Attorney Peter F. Durning, Special Counsel*
Attorney Durning shared his screen with the Board and the Residents providing a presentation regarding 364 West Street. Attorney Durning stated that he hopes this presentation will provide sufficient details and information primarily so that the Board can make an informed decision following the public comment period at this meeting.

Attorney Durning reviewed the events throughout the litigation and mediation process through his presentation. Attorney Durning stated that the factored that favored a negotiation solution were that the Land Court denied our motion for preliminary injunction and prevailing at the Land Court on G.L. c. 61 does not give Hopedale the ability to develop a public water supply. Attorney Durning stated that the core principals guiding the negotiation solution were protecting the Mill River watershed which is hydrologically connected to the Town's current water supply, securing opportunities for the exploration and development of new public water supply sources, owning or controlling the greatest amount of the forest land possible and preserving it as conservation land, and obtaining concessions for GU RR that would promote local control and/or the application of state and local rues and regulations on railroad parcels to the greatest extent possible to promote protection of the watershed and to preserve the ability to develop future water supply. Attorney Durning stated that it is important to point out again, regarding the last point, the Interstate Commerce Commission Termination Act (ICCTA) grants railroads significant protection under Federal Law. Whereby, railroads generally do not have to abide by State and local regulations. For example, railroads generally do not have to abide by the Massachusetts State Wetlands Protection Act. If the Town were able to secure adherence to State and Local regulations by the railroad through a private settlement agreement that would give Hopedale greater influence and control on the outcomes of how this land was developed, compared to if the Town went to Court, lost the action and the railroad had free reign to develop these parcels.

Based on the current negotiations, the Town would own outright parcels A and D, these parcels would be deeded to the Town subject to the non-build easement granted under the auspices of the Army Corps of Engineers. They would be accepted by the Town as conservation land consistent with the warrant at Special Town Meeting. Parcels A and D would give the Town control of the full Mill River Corridor. The railroad would own parcels B, C and E.

There are two potential types of water supply on the 364 West Street property, potential bed rock wells base on fracture trace or a well or well field from groundwater in the shallow BLANK. A fracture trace study was performed that shows the confluence of certain ground features that indicate there is a strong likelihood that there would be bedrock fractures below those points that could be explored and exploited for public water supply. Also, a well or well field from ground water is possible, given the soil characteristics and general knowledge of the aquifer associated with the Mill River in this area. These are the two areas the Town was trying to secure to make sure we can get to the public water supply. Attorney Durning noted that the GU RR will need water for their development on their parcels, in this agreement the GU RR is willing to enter a cost sharing agreement with Hopedale that will assist and offset the costs of the exploration for water supply wells.

In addition to the cost sharing agreement, the GU RR is willing to make some additional agreements. Such as, agreeing to impose a no build area (300 X 1000 easement area) located on parcel E. There would be no development on that portion of the parcel for five years. For this agreement, Hopedale would create an easement to allow GU RR to use the eastern most portion of parcel A to do wetlands replication work if some of their work offsets existing wetlands on their parcels. Attorney Durning opened the discussion for Michael Milanowski, President of the GU RR, to

Michael Milanowski, President of GU RR spoke and presented a power point regarding the negotiation expectations for the land at 364 West Street mediation. Milanowski discussed that the railroad and the Town's focus has been regarding protecting future bedrock well location and preserving the current water supply, but the Town needs the GU RR's support. GU RR is trying to work with the Town to work out an agreement to build a municipal well, secure recharge areas, and maintain working safely. Michael Milanowski discussed the resolution that came to fruition regarding the PPP with the Town at a 1 or a 1.5 or greater land swap, since the W Commission did not support this concept the GU RR agreed to negotiate and came to a resolution that now includes sale of land to Town including non-61 (25 acres) parcel. Milanowski continued to discuss the land transfer by One Hundred Realty Trust, explaining what will become and what was negotiated regarding parcels A, B, C, D listed on his power point presentation.

Attorney Peter Durning continued with his presentation. Durning discussed the deed restrictions that the GU RR has agreement to. GU RR has agreed to be bound by certain aspects of the Town of Hopedale's Ground Water Protection Supply bylaw to be applied to parcels B and C. In summary, the railroad has agreed to earth removal requirements, limitations of application and storage pesticides, herbicides, insecticides, fungicides, and rodenticides, limitation on fertilizers, groundwater recharge and groundwater quality, preparation of a hazardous materials management plan. The GU RR has agreed to additional deed restrictions on parcels B and C not included in the Towns bylaw, such as, development will be limited to enclosed buildings or structures so as to avoid outside storage, Owner will keep state and local authorities apprised of any development plan by providing notification to the Board of Selectmen and/or Town Administrator, GU RR provides for enforceability of these provisions though an action to a court of competent jurisdiction, including but not limited to the Massachusetts Superior Court and the Land Court as well as a Roadway provision deed restriction.

Attorney Durning stated that they have negotiated a preliminary agreement with the railroad that will need to be formalized and adopted by the Board of Selectmen if that is the decision of the Selectmen today. The GU RR was informed that the finalized negotiation, if the Board so authorize, to be completed by February 9, 2021. We anticipate that pursuant to that agreement, there will be a conveyance of land from the GU RR to the Town of Hopedale that would take place at a formal closing approximately 60 days after the conclusion of the formal agreement. Pursuant to the terms of the tentative agreement, GU RR is going to donate parcel D, the 363 West adjacent parcel. The Town of Hopedale will be obligated to purchase the additional lands that it is getting from parcel A. The negotiated purchase price is $587,500. The parties are agreeing to split the cost of a formal land survey, to establish the new boundaries on the parcels.

Attorney Durning stated that he endorses this settlement package, the negotiated solution meets the Town of Hopedale's objectives, it dedicates more land for conservation, preserves the aesthetic experience of the parklands, secures watershed protection for the Mill River Watershed, it provides opportunities for public water supply development from the bedrock wells or ground water resources, promotes commercial development in an area that the Town has its own industrial area. Attorney Durning closed his discussion and presentation.

Eric Kelly with Environmental Partners stated that the negotiations support locating potential water supply and protecting the water shed.

Future GU RR Development; *Michael R. Milanoski, President, Grafton and Upton Railroad Company*
Deliberate & Vote Mediation Agreement regarding 364 West Street & 363 West Street ADJ

Selectman Arcudi made a motion to deliberate and vote to accept the negotiated mediation agreement regarding 364 West St and 364 West St adjacent. Selectman Keyes seconded the motion.

Selectman Arcudi stated that his goal was to get the best option for the Town and the residents. Selectman Arcudi feels that with this negotiation the Selectman were able to accomplish that goal by protecting the current watershed and having the ability for future water expansion. The Town also can extend expansion of our parklands. Selectman Arcudi thanked Attorney Peter Durning, Selectman Hazard and Chair Keyes for their time during the process.

Selectman Hazard began a discussion regarding the mediation/negotiation agreement. Selectman Hazard stated that she feels that the railroad has done a disservice to the Town regarding Chapter 61 land. She feels that the negotiation agreement being discussed is vastly different than what the residents voted at Town Meeting and that the decision made tonight should be what the residents desire. Selectman Hazard stated that she is anticipating that, per the feedback from the public at tonight's meeting, and if the Town is not able to hold another Town Meeting, she will likely be voting not in favor to the vote taking place tonight.

Chair Keyes state that the Board of Selectmen's goal if they were not able to get all the land regarding this topic are water shed protection, water supply exploration and protection and obtaining as much of the land as possible. Chair Keyes opened the meeting for public discussion and questions.

Hopedale resident, Jim Donohoe asked if there is a deadline or reason as to if/why the Board of Selectmen need to decide tonight? Attorney During responded that the agreement that the GU RR has put forward, coming out of the mediation, needs to be consummated. The Town made a commitment in entering the mediation agreement. The Board of Selectmen modified the form of the mediation agreement to expressly say that the Board of Selectmen would not be bound by any terms of the agreement until it had the opportunity to conduct public hearing. During mediation, this date was specified as the date of the public hearing.

Hopedale resident and Water Sewer Commission, Ed Burt commented that what was stated at tonight's meeting highlights the core principals of the residents and Town's concerns and goals. He thanked the residents involved in this process. Burt asked is there is a way to extend the five-year limitation regarding building. Attorney Durning stated that the anticipation is that a well is viable and that it would not be under development while Mass DEP might be reviewing new approval. The negotiations state that the five-year limit is firm, while the town can advance its water exploration. The exploration for water supply is aligned between the Town and GU RR, hence the cost sharing agreement. Some residents shared concerns regarding the five-year limit exploration limit for a well. Eric, with Environmental Partners, stated that the timeline is going to be driven by the science. Yes, regarding public supply wells, the exploratory phase can be completed in shorter time frames. What extends the time frame is the connection of a water source, treatment necessary and the infrastructure that supports it. Selectman Hazard asked Attorney Durning if the agreement states that the well will need to be completed in five years or does the Town have five years to determine if the well is viable (exploratory phase)? Attorney Durning responded that the GU RR agrees to not construct any buildings on the 300ftX1,000ft rectangular area for a period of five years or until the Town identifies a financial/feasible public drinking water well supply area on that land.

Public and Board Member Comments (votes will not be taken)

Correspondence and Selectmen Informational Items (votes will not be taken)
Town Administrator Schindler asked Chair Keyes to move this item to after Appointments and Resignations at 7:11PM. Chair Keyes agreed, no vote is required to move item.

Master Plan Steering Committee – The Master Plan Steering Committee would like to invite you to the Vision Workshop! With your assistance in this workshop, you will be able to help us create our Vision Statement that will shape the plan's, goals and recommendations for Hopedale. The workshop will take place via Zoom on January 31, 2021 from 2PM-4PM. To RSVP for the workshop and to receive the Zoom details, visit https://www.envisionhopedale.com. The Master Plan Steering Committee would like to thank all of those who participated in the envisionHopedale survey. We received nearly 500 responses! Your responses will help pave the way for the Master Plan. The results of the survey will soon be available at envisionhopedale.com.

Jim Abbruzzese, Chair of the Master Plan Steering Committee, discussed the Visio Workshop, via Zoom that is available for residents and non-residents to partake in. During this workshop the Master Plan Steering Committee will ask participants questions such as, what drew them to Hopedale, what keeps them in Hopedale and what they wish to see in Hopedale in the future. The Master Plan will be a guiding document for Departments on the future of the Town. This is also an excellent way for the voice of the people to be heard regarding what community goals are for the Town development.

Requests for Future Agenda Items:

Administrator Updates (In Packet)

Executive Session: None

Selectman Arcudi made a motion to adjourn the meeting. Selectman Hazard seconded the motion.

Arcudi – Aye, Hazard – Aye, Keyes – Aye

Chair Keyes dissolved the meeting at 12:05PM

Submitted by:

__*Lindsay Mercier*_____
Lindsay Mercier, Executive Assistant

Adopted: _____

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.20MISC 00467

TOWN OF HOPEDALE	)
	)
Plaintiff	)
	)
vs.	)
	)
	)
JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST and GRAFTON & UPTON RAILROAD COMPANY,	)
	)
Defendants	)

AFFIDAVIT OF MICHAEL R. MILANOSKI

Now comes Michael R. Milanoski, who on oath deposes and says as follows:

1. I am 52 years old and reside in Cohasset, MA. I am a former resident of Hopedale and graduated from Hopedale Jr. Sr. High School. I am the President of Grafton & Upton Railroad Company, a position I have held since approximately May 2017. I am also a Trustee of One Hundred Forty Realty Trust, a defendant in this case. I have personal knowledge of the facts set forth in this Affidavit.

2. In response to the lawsuit that was filed in November 2020 by the Town in this case, I directed our attorneys to file a Petition for Declaratory Order with the Surface and Transportation Board (STB). The STB was created in 1995 by Congress when it passed the Interstate Commerce Commission Termination Act (ICCTA).

3. A Petition for Declaratory Order was filed on behalf of G&U with the STB on November 22, 2020 a true and accurate copy of which is attached hereto as Exhibit 1.

4. In response to a November 24, 2020 Order from this Court, the defendants, through their attorney, attended a Mediation Screening with the Massachusetts Real Estate Bar Association – REBA Dispute Resolution - in December 2020.

5. As a result of the Mediation Screening, the defendants and the Town agreed to mediate the Town's claim that it had a right of first refusal option to acquire 130 acres+- of forest land pursuant to G.L.c. 61 and to acquire 25 acres +- of additional railroad-controlled land by eminent domain, as well as G&U's STB Petition that the Town's claims were preempted by the ICCTA.

6. The parties jointly selected retired Land Court Justice, Leon Lombardi, to mediate the dispute between the Town and the defendants.

7. The parties mediated the case with Judge Lombardi on January 8 and January 21. With Judge Lombardi's assistance, the parties reached an agreement to settle the Land Court case and the STB case. The parties reached agreement on the terms of the settlement on January 21 and reduced the final agreement to a writing on February 8, 2021. A true and accurate copy of the fully executed Settlement Agreement is attached hereto as Exhibit 2.

8. I am familiar with the Town of Hopedale's General Bylaws, including Section 32-1 which authorizes the Select Board as the Town's agents "to institute, prosecute and defend any and all claims, actions and proceedings to which the Town is a party…" A true and accurate copy of Section 32-1 of the Town's General By-laws is attached hereto as Exhibit 3.

9. Significantly, the defendants insisted on the inclusion of a severability clause in the Settlement Agreement because it was clear that some town residents and public officials were not in favor of the Town settling with the defendants and that someone may attempt to challenge the Settlement Agreement even though all three selectmen were supportive of the settlement

agreement with Judge Lombardi. The severability clause was added at the end of negotiations, one or two days before the Settlement Agreement was executed.

10. The severability clause was agreed to by the Town and is found in Section 10 of the Settlement Agreement and again, this language was bargained for and material to the agreement of the parties because we were concerned that someone via social media with misinformation may attempt to challenge the agreement. Further, the parties bargained for and shall negotiate in "good faith" to cure any defects.

11. The Settlement Agreement has many components including the following:

- Defendants agreed to convey 64+- acres at 364 West Street (Parcel A on plan attached to Settlement Agreement) to the Town in consideration of a payment of $587,500 from the Town;
- Defendants agreed to donate 20+- at 363 West Street (Parcel D on the plan attached to the Settlement Agreement) to the Town for conservation purposes;
- Defendants agree to impose Ground Water Protection Deed Restrictions on 50+ acres of land retained by the Defendants at 364 West Street;
- The Town, through its Board of Selectmen/ Select Board waived any and all right of first refusal claims under Chapter 61;
- Defendants agree to Army Corp of Engineer deed restrictions on 84 acres (Parcel A and D on plan attached to Settlement Agreement) which protects this land from development and which contain conservation-based covenants preserving the subject land in its natural condition in perpetuity;

- Defendants agreed to a 5 year no-build restriction on 300,000+- square feet land retained by defendants (part of Parcel E on plan attached to Settlement Agreement).
- Defendants' agreement to work in good faith with the Town to develop potential well on Parcel A on plan attached to Settlement Agreement;
- Agreement between Town and Defendants to Cost Sharing for water testing / hydrogeological analysis on Parcel A;
- Agreement between Town and Defendants to cost sharing with respect to engineering / survey work to be performed that has been completed by the Defendant;
- Agreement by Defendants to install monitoring wells at our own expense on Parcels B, C, and E and share information with Town from monitoring;
- Defendants' agreement to restrict buildout of Parcel B on plan attached to Settlement Agreement to enclosed buildings/structures;
- Defendants' agreement to a 50-foot easement restriction building in riparian buffer zone on Parcels B and C on plan attached to Settlement Agreement;
- Withdrawal of the STB Petition for Declaratory Order by G&U;
- Mutual Releases.

12. The Board voted to approve the Settlement Agreement at its February 8, 2021 public hearing. During that hearing, members of the Board described in detail the consideration included in the Settlement Agreement. A copy of the Board of Selectmen's February 8, 2021 public hearing minutes defending the Settlement Agreement and describing the consideration included in the Settlement Agreement is attached hereto as Exhibit 4.

13. G&U and the Trust have been acting in conformity with the terms of the Settlement Agreement since it was executed in February 2021 and continue to be ready, willing and able to convey / transfer Parcels A and D to the Town.

14. If the Town does not want to accept the donation of Parcel D and/or pay $587,500 for Parcel A it will still have the benefit of an Army Corp of Engineer deed restriction in perpetuity on those parcels that will protect the land in perpetuity from development resulting in the same benefits to the Town without purchasing the land as agreed to.

15. G&U and the Trust have done nothing but act in accordance with the Settlement Agreement since February 2021 and continue to do so.

16. Nothing has prevented the Town from scheduling a Special Town Meeting to reauthorize and reduce the previously approved appropriate funds to acquire Parcel A and /or to accept Parcel D as a donation. The fact that the Town has not scheduled a meeting is not the result of anything the G&U and/or the Trust did, or did not do.

17. The Town, along with the G&U Defendants, defended the Settlement Agreement in response to a 10-Taxpayer lawsuit filed in Worcester Superior Court in March 2021, until the Town filed its Motion to Vacate the Stipulation of Dismissal on December 30, 2021. The Town has done a 180 degree turn after 10 months of defending the Settlement Agreement.

18. On December 28, 2021, the Board issued a "Statement on Status of Litigation Involving 364 West Street", a true and accurate copy of which is attached as Exhibit 5. In this document, the Board outlined its decision not to attempt to acquire the land described in the Settlement Agreement, but to instead proceed with filing the subject Motion to Vacate. Id. The Board noted that "the Superior Court judgment has no binding effect whatsoever on what the Land Court may do with the Town's attempt to reopen the case." Id.

19. Since the Settlement Agreement was executed in February 2021 the defendants have spent more than $210,000 to carry out their responsibilities and obligations under the agreement including property / on-ground boundary survey, title review, wetland analysis and protection, silt fence and wetland protection required by Massachusetts Department of Environmental Protection, stormwater permit/plans and engineering, water testing review, bridge deck reconstruction, access road base materials development, construction matts, tree harvesting, site security, mobilization, engineering, labor and associated legal analysis for these items, as well as other site improvements.

20. Per the settlement agreement the Defendants have continued its effort to develop the property per the agreement with the town that is programed to expend over $100,000,000 in development cost that will provided needed jobs and tax revenue to the town while helping to improve the national transportation supply chain bottleneck with the improvement of this railroad focused project consistent with the Town's Master Plan and Industrial Zoning that has been in effect for this land since the town adopted zoning.

21. Furthermore, per the settlement agreement, I directed G&U's STB counsel to file a Motion to Dismiss the STB Petition, which he did on February 16, 2021. The STB granted the Motion to Dismiss on February 17, 2021. A true and accurate copy of G&U's Motion to Dismiss and STB's Allowance of the Motion to Dismiss are attached hereto as Exhibits 6 and 7 respectively. The STB Declaratory Petition has been dismissed. It would be grossly unfair for the Town to be able to vacate this dismissal of this Land Court while the STB Petition remains dismissed.

22. Finally, under Sections 10 and 14 of the Settlement Agreement, the Parties are required to negotiate in good faith if a dispute arises with respect to whether any provision is

unenforceable. The Town did not contact the defendants to engage in good faith discussions to see if the parties could resolve the one component that is being challenged, the Town's funding of the acquisition of Parcel A. It is interesting to note that if the Town decides not to pay G&U monetary consideration for Parcel A and/or does not vote to accept the donation of Parcel D, the Town will nonetheless receive all the benefits of the protecting the land with the Army Corps of Engineers Deed restrictions and other consideration the defendants agreed to.

Signed under the penalties of perjury this 18th day of January 2022

/s/ Michael R. Milanoski

CERTIFICATE OF SERVICE

I hereby certify that this document filed by email on January 18th, 2022 will be sent by separate email to.

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EXHIBIT 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

VERIFIED PETITION FOR DECLARATORY ORDER OF GRAFTON AND UPTON RAILROAD COMPANY

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Attorney for Grafton and
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Dated: November 22, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

VERIFIED PETITION FOR DECLARATORY ORDER OF GRAFTON AND UPTON RAILROAD COMPANY

INTRODUCTION

By this Petition, Grafton and Upton Railroad Company ("GU") requests the Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to the effect that state and local statutes and regulations are preempted pursuant to 49 U.S.C. § 10501 in connection with the efforts of the Town of Hopedale (the "Town" or "Hopedale") to prevent GU from using its property located in Hopedale for purposes of rail transportation. As explained below, construction of additional tracks and rail transportation facilities is critical in order to support the existing and future operations of GU. Hopedale is attempting to use state and local law in a lawsuit initiated by the Town in state court in Massachusetts not only in order to block such use by GU but also to take the property from GU. This blatant attempt by Hopedale to interfere with rail transportation is preempted by Section 10501.

FACTS AND RELEVANT BACKGROUND

GU is a Class III rail carrier that has been in continuous operation since its incorporation in 1873. GU owns and operates a 16.5 mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts and Milford, Massachusetts. Over the

last 10 years, GU has invested millions of dollars in order to upgrade its line and to establish transloading facilities at North Grafton and Upton, Massachusetts. At North Grafton, GU operates a facility where liquid propane arrives by rail and is transloaded to trucks for distribution in the Eastern Massachusetts area. GU has also developed a significant transloading operation in Upton, which handles a variety of chemicals and other bulk commodities. In addition, for many years GU has maintained and operated a small yard at Hopedale where GU transloads cement, sheet rock and several other commodities. See accompanying Verified Statement of Michael R. Milanoski ("Milanoski VS") at ¶¶ 2-3.

GU has experienced significant traffic growth over recent years. In 2010, GU interchanged approximately 200 cars with CSX, and by 2019 the number of cars interchanged was approximately 3000. A steady growth in business is expected to continue into the future. For calendar year 2021, GU anticipates moving 3500 carloads. Milanoski VS at ¶ 4.

A recent acquisition transaction guarantees that GU will move a minimum of an additional 400 carloads per year of new business. CSX and GU have recently entered into a lease and related agreements pursuant to which GU will operate an 8.4 mile CSX line between the terminus of the GU-owned line in Milford and Franklin, Massachusetts, where GU will have a new, second interchange with CSX. See *Grafton and Upton Railroad Company--Acquisition and Operation Exemption—CSX Transportation, Inc.*, Docket No. FD 36444. The traffic over the line leased from CSX will move between the interchange with CSX in Franklin, through Hopedale, Upton and the CSX-GU interchange in North Grafton. Milanoski VS at ¶ 5.

The continuous growth in business has led GU to look for property along its right-of-way in order to expand its yard capacity and ability to handle the new business expeditiously. In 2018, GU initiated discussions with the owner of a 155 acre parcel of real estate located at 364

West Street in Hopedale. The property is zoned industrial, bisected by the GU right-of-way and would make an ideal location for a much-needed expansion of GU's existing yard in Hopedale. The property could be used for additional yard and side tracks and for car storage and switching. Such additional property could also be used for transloading facilities, for which there is a demand, equipment maintenance and other activities essential to the functioning and support of rail operations generally. Milanoski VS at ¶¶ 6-7.

The negotiations with the owner of the 364 West Street were initially unsuccessful in reaching an agreement. As an alternative means to acquire the property, GU turned to Massachusetts statutes that permit railroads to acquire land for rail transportation purposes. MGL c. 160, § 83 provides in relevant part that if a railroad requires land for any of the purposes specified in MGL c. 160 § 78 and is unable to obtain the property by agreement with the owner, the railroad may apply to the Department of Public Utilities ("DPU"), which after notice and hearing can authorize the taking of the property by the railroad by eminent domain. MGL c. 160 § 78 authorizes a railroad to purchase land that may be "reasonably necessary" for the "proper construction and security" and the "convenient operation" of the railroad, including a variety of specified purposes, such as "one or more new tracks adjacent to other land occupied by it by a track or tracks already in use, and for the purpose of cuttings, embankments, for procuring stone and gravel, and for stations, car houses, round houses, freight houses, yards, docks, wharves, elevators and other structures". Milanoski VS at ¶ 8.

The DPU proceeding was initiated by GU on March 15, 2019. A number of interested persons, including the Town, asked the DPU for leave to intervene or to participate in the proceeding. In support of intervention, Hopedale contended that GU had not presented sufficiently specific plans for its use of the 155 acre parcel. The Town also expressed a desire to

maintain town park and trail lands and suggested, without support, that GU's acquisition of the property "may" pose risks to the Town's water supply. Significantly, the Town never contended that GU could not acquire the property and use it for rail transportation purposes or that the Town itself could acquire the property. While the DPU reached decisions in February, 2020 concerning the parties that would be permitted to participate, the DPU has yet to address the merits of GU's petition. Milanoski VS at ¶¶ 8-9.

Beginning in 2019 and continuing through October, 2020, GU representatives had numerous conversations with the Town to discuss a public-private partnership pursuant to which Hopedale would forego the exercise of the right of first refusal. For its part, GU indicated a willingness to carve off a portion of the 155 acre parcel and convey it to Hopedale to enable the Town to increase the size of its park land and to pay for infrastructure improvements to the Town's existing park land. GU also offered to take steps to protect well sites in order to address a concern expressed by the Hopedale Water and Sewer Commission. In short, GU made it clear to Hopedale that GU was willing to take steps to mitigate reasonable concerns expressed by Hopedale and that GU recognized its obligation to comply with generally applicable health and safety regulations in connection with its use of the property. Milanoski VS at ¶¶ 10-11.

While GU and the Town continued to discuss a public-private partnership, GU and the property owner resumed negotiations in an effort to agree on the terms of a private sale. As of June 27, 2020, the trustee of the realty trust that owned the property entered into an agreement with a realty trust that was indirectly controlled by GU for the purchase and sale of the 155 acre parcel. Because approximately 130 acres of the property was classified as forest land pursuant to MGL c. 61 (the "Chapter 61 Property"), the owner gave notice to Hopedale of the intention to sell the Chapter 61 Property to be used for rail transportation purposes. Milanoski VS at ¶ 9.

Chapter 61 is a state tax statute that provides for lower taxation rate for forest land. According to that provision, when land classified under Chapter 61 is converted, or sold with the intent to convert, from forestry use to a different use, the local taxing authority acquires a right of first refusal to purchase the land. While it was not entirely clear whether, in the circumstances presented here, notice to the Town of the transfer of ownership and change in use would be required, the owner provided notice which, if effective, afforded Hopedale a right of first refusal, exercisable within 120 days, to purchase the Chapter 61 Property. The Notice stated that the proposed use of the property was to provide "additional yard and track space in order to support the current and anticipated increase in rail traffic of [GU's] transloading operations". On August 19, 2020, the Town advised the owner that, in the view of the Town, the notice was defective. Milanoski VS at ¶ 9.

On October 7, 2020, the trustee of the trust that owned the property advised Hopedale of the withdrawal of the notice of intent to sell the Chapter 61 Property. GU and the trust agreed to transfer ownership of the Chapter 61 Property by means of the beneficiaries of the trust selling their beneficial interest to GU, which was accomplished on October 12, 2020. On October 12, the owner also conveyed by quitclaim deed to GU the 25 acre portion of the property that was not subject to Chapter 61. The owner of GU and the president of GU became the new trustees of the trust that owns the Chapter 61 Property. As a result of these transactions, GU now owns the beneficial interest in the trust, which holds legal title to the Chapter 61 Property, thereby effectively gaining control of the Chapter 61 Property. Milanoski VS at ¶ 12.

By letter dated November 2, 2020, Hopedale advised the trustees of the trust that the Town had decided to exercise the right of first refusal to acquire the Chapter 61 Property while also simultaneously acknowledging that the trust "retains legal title to the [Chapter 61 Property]

at issue". In addition, the Town's governing body, the Board of Selectmen, voted in favor of using eminent domain in order to acquire the 25 acre portion of the property owned in fee by GU. Milanoski VS at ¶¶ 13-14.

Hopedale has followed up by filing a complaint on October 28, 2020 in the Land Court Department, which is part of the trial court system in Massachusetts, against the trust and GU asking for various forms of declaratory and injunctive relief. Hopedale alleged that it held an option to purchase the Chapter 61 Property and asked the court to prohibit GU from taking any actions or engaging in any activities with respect to the Chapter 61 Property that would convert the use of the property from the Chapter 61 forestry designation. Hopedale has also requested the court to order specific performance requiring GU to convey the Chapter 61 Property to Hopedale.

GU has opposed the Town's request for such injunctive relief and has urged the state court to allow the Board to decide whether such relief is preempted. The Town's request for such injunctive relief is scheduled to be heard by the court on November 23, 2020.

ARGUMENT

GU is the owner of the Chapter 61 Property. Such ownership is clear based upon the assignment of the beneficial interest by the prior owner to GU. Hopedale has acknowledged GU's ownership of the Chapter 61 Property in an amended complaint filed on November 2, 2020: "[GU] now owns the controlling beneficial interest in the Trust, which holds legal title to the Chapter 61 Land" and "the Trust's assignment of 100% of its beneficial interest to [GU] was equivalent to a transfer of title to the Chapter 61 Land". Amended Complaint at ¶¶ 31 and 43.

As demonstrated below, the Town's reliance in the state court proceedings on Chapter 61 should be preempted for two reasons. First, the Town's efforts to prevent GU from using the

Chapter 61 Property for rail transportation purposes amount to an attempt to impose preclearance or permitting requirements that would deny or unreasonably delay GU's ability to conduct rail transportation operations and, consequently, are categorically preempted. Second, reliance on Chapter 61 and state court proceedings to compel a conveyance of real estate owned by GU is tantamount to an attempted eminent domain taking that cannot be permitted, because it would unreasonably burden and interfere with rail transportation and interstate commerce.

I. A Declaratory Order is Required to Remove Uncertainty.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. As demonstrated above, there is an actual controversy between GU and Hopedale concerning GU's right to use and continue to own the Chapter 61 Property for rail transportation purposes. The Board should issue the requested declaratory order to remove the uncertainty.

II. This is an Appropriate Case to Apply Preemption.

Since the enactment of the Interstate Commerce Commission Termination Act, the Board and the courts have considered the preemption provisions set forth at Section 10501(b) on many occasions so that the contours of preemption are now well defined. The Board's jurisdiction over "transportation by rail carriers" is exclusive. The threshold inquiry for the application of preemption is whether that "transportation" is being or will be provided by a "rail carrier".

There is no question that GU is a rail carrier that currently provides transportation and will provide transportation services by using the Chapter 61 Property in the manner described above. "Transportation" is broadly defined by statute as including any "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail

regardless of ownership or an agreement concerning use" and "services related to that movement". 49 U.S.C. § 10102(9). The term "railroad" is also expansively defined as including "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation". 49 U.S.C. § 10102(6)(C). The acquisition and use of property for purposes of constructing and operating additional tracks and facilities clearly comes within the meaning of "rail transportation".

As the Board is well aware, preemption applies equally to rail transportation activities over which the Board has jurisdiction even though it does not exercise direct licensing authority. In particular, preemption applies to the acquisition, construction or operation of facilities, such as yards and sidetracks that are ancillary or adjacent to a rail carrier's line and therefore do not require Board authorization, by reason of 49 U.S.C. § 10906, for the construction or operation of such facilities. Attempts by state or local authorities to regulate such facilities have been preempted. *Borough of Riverdale—New York, Susquehanna and Western Railway*, 4 S.T.B. 380, 387-88 (1999); *Friends of the Aquifer*, Docket No. FD 33966, decision served August 15, 2001 ("this broad statutory preemption applies to the construction of ancillary facilities under section 10906, even though we lack licensing authority over such projects"); *Grafton & Upton Railroad Company--Petition for Declaratory Order*, Docket No. FD 35779, decision served January 27, 2014 ("*GU 2014 Decision*") and decisions cited therein.

III. Chapter 61 is Preempted as an Attempt to Impose a Preclearance Condition.

Section 10501 precludes states or local authorities from intruding into matters that are directly regulated by the Board, such as rail services or construction. Section 10501 also prevents the use of state or local law to impose requirements that could be used to deny a rail carrier the ability to conduct rail operations. Consequently state and local permitting or

preclearance regulations are categorically preempted as to any transportation facilities that are integral to the provision of rail transportation. *GU 2014 Decision; Green Mountain Railroad v. Vermont,* 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting requirements were preempted because otherwise the locality could delay the process indefinitely or deny the carrier the right to construct facilities or conduct operations); *Boston and Maine Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order*, Docket No. FD 35749, decision served July 19, 2013 (requirements that by their nature could be used to deny a railroad the ability to conduct rail operations are preempted).

A review of the facts relating to this Petition leads to the conclusion that the attempt by Hopedale to prevent GU from constructing additional tracks and facilities at the Chapter 61 Property is categorically preempted. Clearly, GU is a rail carrier providing transportation services subject to the jurisdiction of the STB. GU intends to use the Land for the construction of sidetracks and additional yard tracks and other facilities in order to meet the increased traffic demands that GU has experienced over the last several years and the growth that is expected in the future. The Chapter 61 Property, the tracks and the other facilities constitute "transportation". Consequently, GU is a rail carrier providing rail transportation, and the only remaining question is whether the efforts of Hopedale are preempted.

The Board's discussion and rationale in *GU 2014 Decision* are instructive. In that matter, GU asked the Board to issue a declaratory order to the effect that state and local permitting and preclearance regulations were preempted in connection with GU's construction of additional yard and storage tracks on a 5 acre parcel of property located in the Town of Grafton, Massachusetts. GU acquired the 5 acre parcel, which is located along the right-of-way, in order to provide additional yard and track space to relieve congestion at the interchange between GU

and CSX in North Grafton. The Town of Grafton threatened to seek injunctive relief in order to block the construction of the new yard, arguing not only that local permitting regulations had not been met but also that the construction and use of the property by GU would pose a risk to the town's water supply.

The Board concluded that the regulations and permitting requirements relied upon by the Town of Grafton were categorically preempted in connection with GU's construction and operation of the yard. The Board acknowledged the town's ability to request information from GU concerning the project, so long as such requests did not unreasonably burden interstate commerce or hold up or defeat GU's right to construct and operate the yard. The Board noted that GU had adequately addressed the town's purported concern about potential impacts on the water supply.

As in the earlier matter involving the Town of Grafton, Hopedale is relying on state and local regulations and litigation in order to prevent GU from constructing and operating new tracks and rail facilities. Consequently, Hopedale's actions are categorically preempted.

IV. The Town's Attempt to Use Eminent Domain is Preempted.

By means of its state court action in reliance on Chapter 61, the Town is trying to acquire title to the Chapter 61 Property from GU. This effort is tantamount to an attempted eminent domain taking, which in these circumstances is preempted. Even more clearly, the threat by Hopedale to take the 25 acre parcel, which is not subject to Chapter 61, by eminent domain is preempted.

The Board and courts have decided numerous cases involving attempts by state or local authorities to acquire or use railroad property by means of eminent domain. While certain takings of railroad property would not be preempted if they did not interfere with or impede rail

operations, attempts by state or local authorities to take rail property for another use that would unreasonably burden or interfere with present or future rail use are preempted. *Union Pacific Railroad Company v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) (a proposed condemnation for a permanent easement over the railroad's right-of-way was preempted); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (the proposed use of eminent domain to acquire a 20 foot strip of railroad right-of-way that had the potential to interfere with the storage of materials moved by the rail was preempted); *Norfolk Southern Railway—Petition for Declaratory Order*, Docket No. FD 35196, decision served March 1, 2010 (attempted condemnation of property that the railroad was not actively using was preempted because the proposed condemnation would unreasonably interfere with the railroad's future plans); *14550 Ltd.--Petition for Declaratory Order*, Docket No. FD 35788, decision served June 5, 2014 (claims of adverse possession and a prescriptive easement were preempted).

In order to determine whether a proposed acquisition of rail property by a state or local authority is preempted, the Board undertakes a fact specific analysis as to whether the proposed condemnation would prevent or unduly interfere with railroad operations or interstate commerce. The analysis takes into account not only the railroad's current use of the property but also future plans for use. *Tri-City Railroad Company--Petition for Declaratory Order*, Docket No. FD 35915, decision served September 14, 2016.

Hopedale acknowledges that GU owns the Chapter 61 Property. In order to block GU's use of the property for rail transportation purposes and to acquire the Chapter 61 Property itself, Hopedale has relied on a right of first refusal provided pursuant to Chapter 61. While Hopedale is not attempting to proceed on the basis of an express eminent domain statute, the intended

effect of exercising a right of first refusal to acquire the property owned by GU is tantamount to an effort to use eminent domain.

As demonstrated above, wresting the Chapter 61 Property and the 25 acre parcel not subject to Chapter 61 from GU's ownership would prevent or unduly interfere with rail operations and unreasonably burden interstate commerce. If deprived of ownership and the right to use these properties, GU will be severely handicapped in its ability to meet the demands of its current and anticipated new customers. This is a classic case for the application of preemption to protect rail transportation that is subject to the exclusive jurisdiction of the Board.

V. This Matter is Ripe for Decision by the Board.

It may be anticipated that Hopedale will oppose this Petition by arguing that there is a state law property issue that should be resolved by the Massachusetts court before the Board considers the merits of the Petition. More specifically, Hopedale may contend that there is some question concerning Chapter 61 or GU's acquisition or ownership of the property that needs to be decided under state law prior to any resolution of the preemption issues.

Any such contention by Hopedale should be summarily rejected. Hopedale has admitted that GU is the owner of the Chapter 61 Property. Indeed, the entire premise of the relief requested by Hopedale in the state court, i.e. reliance on Chapter 61 as the basis for an injunction preventing GU from changing the use of the property and specific performance requiring GU to convey the property to Hopedale, is based on GU's ownership and intended use of the property for rail transportation purposes. Hopedale has acknowledged GU's ownership, and the intended change of use by GU to rail transportation is a matter within the exclusive jurisdiction of the Board. It is not a matter of state property law.

The Board should proceed immediately to address the preemption issues even if there may be some question whether the Town has a valid, enforceable right of first refusal. As demonstrated above, the Town admits that GU owns or controls the Chapter 61 Property, and, as the Board knows, the definition of "transportation" includes property and facilities "regardless of ownership or an agreement concerning use". There is an existing controversy that should be resolved now by recognizing that preemption prevents Hopedale from attempting to use Chapter 61, whatever the status of any right of first refusal or any other arguments based on state or local law that Hopedale may advance in order to attempt to deny GU the right to use the property for rail transportation purposes. Indeed, given the Town's approach thus far, further attempts to block GU's use of the property can be anticipated and should be resolved now by the entry of a declaratory order preempting such attempts.

CONCLUSION

For the reasons outlined above, the attempt by the Town to use state law to prevent GU from constructing and using new transportation facilities on the Chapter 61 Property amounts to an attempt to impose a preapproval requirement that is categorically preempted. Furthermore, the Town's effort to convert Chapter 61 into an eminent domain statute to take GU property is also preempted as imposing an unreasonable burden on rail transportation. Consequently, the

Board should grant the Petition and enter a declaratory order to the effect that the actions by Hopedale are preempt.

Respectfully,

/s/James E. Howard

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jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

Dated: November 22, 2020

VERIFICATION

I, Michael R. Milanoski, president of Grafton and Upton Railroad Company, hereby verify under the penalty of perjury that to the best of my knowledge the facts set forth in the foregoing Verified Petition for Declaratory Order are true and correct. Furthermore, I certify that I am qualified and authorized to make such verification on behalf of Grafton and Upton Railroad Company.

Executed this 22nd day of November, 2020.

Michael R. Milanonski

EXHIBIT 2

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement is made and entered into this 8th day of February 2021, by and between the following parties (the "Parties"): plaintiff Town of Hopedale, by and through its Board of Selectmen (the "Town"), defendants Jon Delli Priscoli and Michael Milanoski, Trustees of the One Hundred Forty Realty Trust (the "Trust") and Grafton and Upton Railroad Company ("G&U") (collectively the Trust and G&U may be referred to as the "Defendants").

WHEREAS, on or about October 28, 2020, the Town filed & sought preliminary relief in the action entitled Town of Hopedale v. Jon Delli Priscoli, et al, Massachusetts Land Court No. 20MISC00467 (the "Land Court Matter");

WHEREAS, on or about November 22, 2020, G&U filed a Petition for Declaratory Order with the federal Surface Transportation Board, Docket No. FD 36464, (the "STB Matter", together with the Land Court Matter, the "Litigations").

WHEREAS, on November 24, 2020, the Land Court referred the Land Court Matter to Pre-Mediation Screening process offered by the Real Estate Bar Association of Massachusetts;

WHEREAS, the Parties agreed to mediate the issues in the Litigations on January 8, 2021 before former Land Court Judge Lombardi (the "Mediation");

WHEREAS, the Parties attended mediation sessions on January 8 and January 21 and reached a preliminary agreement on the principal terms of a settlement of the Litigations, which was memorialized in a document entitled Settlement Term Sheet;

WHEREAS, the preliminary agreement memorialized in the Settlement Term Sheet was subject to a formal vote by the Town's Board of Selectmen, in a public meeting on Monday, January 25, 2021;

WHEREAS, the Board of Selectmen voted to adopt and approve the terms of the preliminary agreement memorialized in the Settlement Term Sheet at the January 25, 2021 public meeting;

WHEREAS, in order to avoid the time and expense of litigation and without any admission of liability by any of the Parties, the Parties desire to settle fully and finally all differences between them regarding the Litigations, including specifically legal rights to real property located at 364 West Street, Hopedale, MA and any and all claims that were raised or could have been raised therein and any and all defenses and counterclaims that were raised or could have been raised therein;

NOW THEREFORE, in consideration of the promises and covenants set forth below, including, but not limited to, the Mutual Release of Claims, and for other good and valuable consideration as set forth in this Agreement, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

1. Division of Property: The property subject to division by agreement is located at 363 West Street and 364 West Street, and is depicted as Parcels A, B, C, D and E on a document entitled Conceptual Lotting Exhibit – January 26, 2021, which is attached hereto as Exhibit 1. The Defendants collectively are the current record owners of Parcels A, B, C, D and E. The Defendants agree that they will take such action so as to effectuate ownership of these parcels as follows:

    a. Parcel A:

        i. Within 60 days of the date of the execution of this Agreement, the Defendants, in consideration of the payment of $587,500, shall effectuate the conveyance of Parcel A by quitclaim deed(s) to the Town, or its

designee, reserving to the grantor(s), and their successors a slope / grading, utility easement, in the general location depicted on Exhibit 1 and further reserving to the grantor(s) a 100-foot wide easement for a bridge to facilitate the stream crossing over the Mill River at the general location depicted on Parcel A in Exhibit 1, and an easement for installation of a water supply well(s) or well fields for the benefit of the grantors and their successors. The date of the conveyance referenced in the prior sentence may be extended by written agreement of the Parties. Any water supply well(s) or wellfields installed pursuant to the third easement mentioned above shall be abandoned when a public water supply becomes available and operational on Parcel A; provided however, that the Trust shall have the right to connect to the public water supply in consideration for its abandonment of its private well(s). In other words, other than the usual and customary cost of connecting to a public water supply, the only consideration owed by the Trust, or its designee and/or successors to the Town for connecting to a public water supply on Parcel A shall be its abandonment of its private well/water supply. Any hydrogeological analysis performed as part of the exercise of the easement for the installation of a water supply well shall be performed by a licensed engineer and any results from such hydrogeological analysis shall be shared with the Town. The Trust or its designee and/or successors shall comply will all applicable health and safety state and federal laws and regulations regarding the development and operation of a water supply

well ; provided however, nothing herein shall be interpreted as subjecting any such work to any local preclearance requirements.

ii. In addition to the consideration of $587,500 being paid by the Town for the conveyance Parcel A, the Parties agree that the Town shall agree to increase the purchase price to cover the cost of any roll back taxes that may be due by the Trust as a result of the change in use of the land in 364 West Street being classified as forestry land under Chapter 61 as determined by the Hopedale Board of Assessors as of the date of the Closing. Within five (5) business days of the Closing, the Trust shall pay the full amount of the roll back taxes to the Town.

iii. Parcel A shall be transferred to the Town, or its designee, subject to an Army Corp of Engineers no-build easement, so long as such easement will not preclude development of a new water supply well or wellfield for the Town, and for the benefit of the grantors and their successors and for the purpose of maintaining and preserving said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes, subject to the aforementioned easements.

iv. The Town in its discretion may perform any hydrogeological analysis for the purpose of establishing a public drinking water supply well on Parcel A pursuant to 310 CMR 22, including, but not limited to, activities to support a Site Screening for Siting a New Public Water Supply and pumping test pursuant to applicable state regulations (collectively the

"Hydrological Analysis") at any location on Parcel A that is more than 400 feet (or 250 feet for a wellfield) from Parcel E, Parcel C and Parcel B.

v. Any such Hydrogeological Analysis commenced under paragraph 1(A)(v) must be performed by a licensed professional engineer and any results from such analysis must be shared with the Trust.

vi. In the event that such analysis performed under paragraph 1(A)(v)) indicates the feasibility and financially viability of a public water supply well or wellfield the Trust and its successors will work in good faith with the Town to satisfy Massachusetts Department of Environmental Protection ("MassDEP") drinking water regulations so that a well or well field may be developed; provided however, that nothing herein shall require the Trust, or its successors to convey any land in Parcels, B, C and E to the Town, or its designee to satisfy the Defendants' commitment to work in good faith. For the purpose of this sub-paragraph and this Agreement the term "feasible" shall mean a well capable of producing a water source that will supply greater than 10% of the Town's water demand, and the term "financeable" shall mean that the Town has voted to appropriate the necessary funds to pay for the expenses associated with developing a well, or well field.

vii. It is agreed that the intent of the well-testing process set forth in Section 1(a) is to provide appropriate mitigation measures to assist the Town, but it is not intended to stop or curb development of adjoining Parcels, B, C or E.

viii. The Trust agrees to collaborate with the Town in good faith to establish a formula to share costs and expenses associated with any such testing and Hydrogeological Analysis, on a pro rata basis pursuant to the Cost Sharing Agreement attached hereto as Exhibit 2. In the event that the Parties and any third-party cannot come to an agreement on the terms of such a Cost Sharing Agreement in substantial compliance with Exhibit 2, each party shall be responsible for its own costs and expenses related to such Hydrogeological Analysis.

b. Parcel B:

i. The Trust shall retain ownership in fee of Parcel B, subject to its unconditional right to convey this Parcel to a designee;

ii. Parcel B shall not be subject to Chapter 61 of the Massachusetts General Laws.

iii. The Trust at its own determination, and in its sole discretion as to location, shall install appropriate monitoring wells on Parcel B and hereby agrees to share data from such monitoring wells as required by applicable law.

iv. The Trust, and/or its designee/successor agrees to construct an enclosed building/structure, or multiple enclosed buildings / structures on Parcel B.

v. The Trust, its designee and/or successor agrees to record a deed restriction on Parcel B for groundwater protection, in the form attached hereto as Exhibit 3.

vi. The Defendants agree to record a 50-foot easement restricting building in a “riparian buffer zone” area marked on Exhibit 1, but reserving the right

to use this easement area for stormwater management features providing infiltration (i.e. – not oil-water separators or other contaminant removal structures) and/or driveway(s).

vii. Consistent with their established practice, Defendants agree to keep state and local authorities apprised of any development plans/intentions.

c. Parcel C:

i. Defendants shall retain ownership in fee of Parcel C, subject to its unconditional right to convey this Parcel to a designee.

ii. Parcel C shall not be subject to Chapter 61 of the Massachusetts General Laws.

iii. Defendants at their own determination, and in their sole discretion as to location, shall install appropriate monitoring wells on Parcel C and hereby agree to share data from such monitoring wells as required by applicable law.

iv. Defendants intend to construct a bridge to facilitate the stream crossing over the Mill River at the general location depicted on Parcel C on Exhibit 1.

v. The Defendants, their designee and/or successor agree to record a 50-foot easement restricting building in a riparian buffer zone area marked on Exhibit 1, but reserving the right to use this easement area for stormwater management features providing infiltration (i.e. – not oil-water separators or other contaminant removal structures) and/or driveway(s).

vi. Defendants agree to record a deed restriction on Parcel C for groundwater protection, in the form attached hereto as Exhibit 3.

vii. Consistent with their established practice, Defendants agree to keep state and local authorities apprised of any development plans/intentions.

d. Parcel D:

i. Subject to approval by a majority vote at Town Meeting pursuant to G.L. c. 40, § 14, G&U shall donate Parcel D to the Town, or its designee, as is, including but not limited to with all existing encumbrances, municipal liens and tax obligations to be used for conservation purposes in collaboration with the Hopedale, Upton, and Milford Conservation Commissions.

ii. The Parties agreement that should Parcel D shall be transferred to the Town, or its designee, it will be subject to an Army Corp of Engineers no-build easement, so long as such easement will not preclude development of Town's new water supply well, and for the purpose of maintaining and preserving said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes, subject to the aforementioned easements.

e. Parcel E:

i. The Trust shall retain ownership in fee of Parcel E, subject to its unconditional right to convey this Parcel to a designee.

ii. Parcel E shall not be subject to Chapter 61 of the Massachusetts General Laws.

iii. The Trust at its own determination, and in its sole discretion as to location, shall install appropriate monitoring wells on Parcel E and hereby agrees to share data from such monitoring wells as required by applicable law.

iv. The Trust, its designee and/or successor agrees not to construct any buildings on the approximately 300 foot by 1000-foot rectangular area marked on Exhibit 1 for a period of five years, or until the Town identifies a financeable and feasible public drinking water supply well area on the adjacent Parcel A, whichever occurs earlier. In consideration of this 5-year easement in Parcel E, the Trust will reserve and the Town agrees to a five-year replication easement under federal Army Corp of Engineer regulations of approximately 3 acres on Parcel A benefitting the Trust for potential wetlands replication in the area shown on Exhibit 1. Prior to performing any work within the replication easement area, the Trust shall share copies of plans used for the federal replication filings with the Board of Selectmen, the Hopedale Parks Commission and Hopedale Conservation Commission.

2. Waiver of Right of First Refusal: The Town acknowledges that it waives any and all claims and/or rights to acquire any property subject to this Agreement by right of first refusal under Chapter 61 or by eminent domain under Chapter 79 of the Massachusetts General Laws.

3. Roll Back Taxes: As noted in Section 1.a(ii) above, the Parties agree to that any and all claims to any roll-back taxes that may be owed by the Defendants and/or their predecessors in title as a result of property subject to this Agreement being classified, or having been classified under Chapter 61 of the Massachusetts General Laws, shall be addressed at the

Closing where the purchase price for the Chapter 61 forestry land shall be increased by the amount of roll-back taxes determined by the Hopedale Board of Assessors. The Town shall pay the increased purchase price and then within five (5) business days the Defendant shall pay the full amount of the roll-back taxes to the Town.

4. Execution of Purchase and Sale Agreement: The Parties shall execute a standard Purchase and Sale Agreement with respect to the conveyance of Parcel A based on the terms outlined in this Agreement when the survey work contemplated by this Agreement is complete.

5. Miscellaneous:

a. The Town shall not unreasonably withhold support G&U's future application(s) for state and federal grants.

b. The Town shall share proportionately in the engineering and legal title work expense associated with surveying Parcels A, B, C, D, and E based on the acreage of Parcel A compared to the combined acreage of Parcels B, C and E. Said survey work and expense shall include the placement of permanent monuments to properly stake these parcels to delineate ownership of the respective parcels.

c. All land transferred by the Defendants to the Town shall be subject to an Army Corps of Engineers no-build restriction so long as such easement will not preclude development of Town's new water supply well, and for the purpose of maintaining and preserving said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes, subject to the aforementioned easements.

d. The parties agree to make best efforts to close the contemplated transactions within 60 days of the execution of this Settlement Agreement (the "Closing").

e. The Town shall not take any action inconsistent with the terms and intent of this Agreement to extinguish, restrict, eliminate or to take by eminent domain the easement areas delineated on Exhibit 1.

f. The Town acknowledges that the land subject to this Agreement has historically been zoned for Industrial uses within the Town, and further acknowledges that the Defendants relied on the zoning status of this land as allowing Industrial uses as a matter of right to initially acquire the subject land and thereafter to effectuate the allocation of Parcels, A, B, C, D and E in this Agreement. The Board of Selectmen shall continue to support the zoning of Parcels B, C and E as permitting Industrial uses as a matter of right.

g. The Board of Selectmen shall be designated as the decision-making body for the Town for the purpose of implementing the provisions of this Settlement Agreement. The Board of Selectmen shall have the right to consult with any such board, commission, or department as is necessary for carrying out any such terms of this Agreement, but shall retain decision-making authority to the extent permitted by law.

6. Mutual Releases:

a. The Town's Release: In consideration of the covenants, representations and promises set forth in this Settlement Agreement from the Defendants, which covenants, promises and representations survive this Release, the Town hereby releases the Defendants and their representatives, agents, attorneys, employees, directors, officers, shareholders, members, managers, affiliates, subsidiaries, divisions, agents, successors, and assigns (together, the "Defendant Releasees")

from any and all actions, causes of action, suits, debts, charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, and expenses (including attorneys' fees and costs actually incurred), of any nature whatsoever, in law or equity, known or unknown, which the Town had or has against any of the Defendant Releasees relating to the subject-matter of the Litigations, including but not limited to any claims with respect to ownership of real property located at 364 West Street, Hopedale, MA, including any claim asserting a right of first refusal under Chapter 61 of the Massachusetts General Laws. The Town specifically reserve its rights to seek enforcement of this Settlement Agreement.

b. Defendants' Release: In consideration of the covenants, representations and promises set forth in this Settlement Agreement from the Town, which covenants, promises and representations survive this Release, the Defendants hereby release the Town and their representatives, agents, attorneys, employees, directors, officers, shareholders, members, managers, affiliates, subsidiaries, divisions, agents, successors, and assigns (together, the "Town Releasees") from any and all actions, causes of action, suits, debts, charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, and expenses (including attorneys' fees and costs actually incurred), of any nature whatsoever, in law or equity, known or unknown, which the Defendants had or have against any of the Town Releasees relating to the subject-matter of the Litigations, including but not limited to any claims with respect to ownership of real property located at 364 West Street, Hopedale, MA, including any claim asserting a right

of first refusal under Chapter 61 of the Massachusetts General Laws. The Defendants specifically reserve their rights to seek enforcement of this Settlement Agreement.

7. Understanding and Counsel: The Parties represent and warrant that (i) they have read and understand the terms of this Agreement, (ii) they have been represented by counsel with respect to this Agreement and all matters covered by and relating to it, and (iii) they have entered into this Agreement for reasons of their own and not based upon representations of any other person or party hereto.

8. Legal Fees and Costs: Each of the Parties shall pay its own respective costs and attorneys' fees incurred with respect to the Litigations and this Agreement.

9. Entire Agreement: This Agreement, constitutes the entire agreement with respect to the subject matter addressed herein and supersedes any prior written and/or verbal agreements between the Parties.

10. Severability: The provisions of this Agreement are severable and should any provision be deemed for any reason to be unenforceable the remaining provisions shall nonetheless be of full force and effect; provided however, that should any provision be deemed unenforceable by a court of competent jurisdiction, the parties shall negotiate in good faith to cure any such defect(s) in the subject provision(s).

11. Amendments: This Agreement may not be orally modified. This Agreement may only be modified or amended in a writing signed by all of the Parties.

12. Headings: All headings and captions in this Agreement are for convenience only and shall not be interpreted to enlarge or restrict the provisions of the Agreement.

13. Execution in Counterparts; Execution by Facsimile or PDF: This Agreement may be executed in counterparts and all such counterparts when so executed shall together constitute the final Agreement as if one document had been signed by all of the Parties. The Parties agree that facsimile or Portable Document Format ("PDF") signatures shall have the same binding force as original signatures, again as if all Parties had executed a single original document.

14. Actions to Enforce: Should any action be brought by one of the parties in a court of competent jurisdiction, including but not limited to the Massachusetts Superior Court and the Land Court to enforce any provision of this Agreement, the non-prevailing party to such action shall reimburse the prevailing party for all reasonable attorneys' fees and court costs and other expenses incurred by the prevailing party in said action to enforce. Provided however, that before any party to this Agreement files any such action, that party shall identify and inform the opposing party of any alleged violations of the Agreement and the parties shall work in good faith to resolve their dispute prior to filing any action to enforce.

15. Applicable Law: This Agreement shall be construed and interpreted in accordance with the laws of the Commonwealth of Massachusetts. This Agreement shall not be construed against any of the Parties, including the drafter thereof, but shall be given a reasonable interpretation under the circumstances. Nothing in this Agreement shall abrogate the application of any applicable federal law with respect to any of the properties or activities referenced in this Settlement Agreement, including, but not limited to the Clean Water Act and the Safe Drinking Water Act, to the extent applicable.

16. Notice: All notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, electronic mail with proof of

receipt, facsimile, or mailed by certified or registered mail, to the Parties' respective addresses as follows:.

To the Trust:
One Hundred Forty Realty Trust
c/o Michael Milanoski, Trustee
Grafton & Upton Railroad Company
P.O. Box 952
Carver, MA 02330
mmilanoski@firstcolonydev.com

With a copy to:
Donald C. Keavany, Esq.
Christopher Hays Wojcik & Mavricos, LLP
370 Main Street, Suite 970
Worcester, MA 01608
dkeavany@chwmlaw.com

To G&U:
Michael Milanoski, President
Grafton & Upton Railroad Company
P.O. Box 952
Carver, MA 02330
mmilanoski@firstcolonydev.com

With a copy to:
Donald C. Keavany, Esq.
Christopher Hays Wojcik & Mavricos, LLP
370 Main Street, Suite 970
Worcester, MA 01608
dkeavany@chwmlaw.com

To the Board of Selectmen:
Brian R. Keyes, Chair
Board of Selectmen
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
bkeyes@hopedale-ma.gov

With a copy to:
Diana Schindler
Town Administrator
Town of Hopedale
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
dschindler@hopedale-ma.gov

17. Dismissal of Litigations:

a. Attorneys for the Parties shall file a Stipulation of Dismissal With Prejudice in the Land Court Matter within five (5) business days of the execution of this Agreement.

b. Attorneys for the Defendants shall file a Request to Withdraw its Petition for Declaratory Order in the STB Matter within five (5) business days of the execution of this Agreement.

[signatures on following page]

TOWN OF HOPEDALE

By its Board of Selectmen

By_____
Brian Keyes

By_____
Louis Arcudi

By _____
Glenda Hazard

JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as TRUSTEES of the ONE HUNDRED FORTY REALTY TRUST

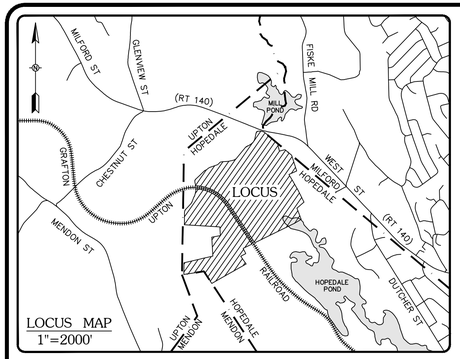
By_____
Jon Delli Priscoli, Trustee

By_____
Michael Milanoski, Trustee

GRAFTON & UPTON RAILROAD COMPANY

By_____
Michael Milanoski, President

Exhibit 1



LOCUS MAP
1"=2000'

CONCEPT ONLY

EXHIBIT NOTES

1. THE PURPOSE OF THIS EXHIBIT IS TO ILLUSTRATE THE CONCEPTUAL LOTTING OF A PORTION OF HOPEDALE ASSESSORS PARCEL 2-5-0 & 2-8-0.
2. THE WETLANDS SHOWN HEREON ARE THOSE OF RECORD WITH MASSDEP AND PROMULGATED BY MASSGIS. SOURCE: MASSGIS (BUREAU OF GEOGRAPHIC INFORMATION), COMMONWEALTH OF MASSACHUSETTS EOTSS.
2. THE LEGAL STATUS OF THE STREETS AND/OR WAYS SHOWN HEREON, WHETHER THEY ARE ACTIVE OR ABANDONED, OR WHETHER THEY ARE PUBLIC OR PRIVATE, WAS NOT MADE PART OF THIS SURVEY.

MA STATE PLANE COORD. SYSTEM
MAINLAND ZONE - NAD 83

TOWN OF UPTON
TOWN OF HOPEDALE

PARCEL D
AREA=20± AC.

MILL
POND

PROPOSED
50' WIDE EASEMENT 3
AREA=3± AC.

PARCEL B
AREA=38± AC.

PROPOSED
100' WIDE BRIDGE
CROSSING EASEMENT 6
AREA=0.5± AC.

PROPOSED
50' WIDE EASEMENT 5
AREA=1.5± AC.

WEST STREET (RT 140)

PARCEL C
AREA=13± AC.

18 ACRE TRACT

PARCEL E

300'
1,000'
EASEMENT 1
PROPOSED 300' WIDE EASEMENT
(AREA=7± AC.)

GRAFTON & UPTON RAILROAD

1,000'
200'
EASEMENT 2 PROPOSED 100' WIDE SLOPE & UTILITY EASEMENT (AREA=2.4± AC.)

PARCEL A
AREA=64± AC.

PROPOSED
EASEMENT 4
AREA=3± AC.

TOWN OF MENDON
TOWN OF HOPEDALE

TOWN OF HOPEDALE
TOWN OF MILFORD

HOPEDALE
POND

DRWN BY:	ZRB	REVISIONS:	
CHK'D BY:	PSB		
APRVD BY:	WML		
0	1/26/21	ISSUED FOR AGREEMENT	
REV #	DATE	DESCRIPTION	

Graphic Scale
1 inch = 200 feet
0 200 400 600

PREPARED BY:
Engineering Design Consultants, Inc.
32 Turnpike Road
Southborough, Massachusetts
(508) 480-0225

PROJECT:
GRAFTON & UPTON RAILROAD
364 WEST STREET
(WORCESTER COUNTY)
HOPEDALE, MASSACHUSETTS

TITLE:
CONCEPTUAL LAND DIVISION
EXHIBIT

PREPARED FOR:
Grafton & Upton Railroad Company
42 Westboro Road
North Grafton, Massachusetts 01536

DATE:
JANUARY 26, 2021

1 OF 1

EDC PROJECT NUMBER
3659

3659 EXH CONCEPTUAL LOTTING R7.DWG

Exhibit 2

COST SHARING AGREEMENT

This Cost Sharing Agreement (the "Agreement") is made and entered into this ____ day of February 2021, by and between the following parties (the "Parties"): the Town of Hopedale, by and through its Board of Selectmen ("Board") and its Board of Water & Sewer Commissioners ("Commissioners," together with the Board, the "Town"), Jon Delli Priscoli and Michael Milanoski, Trustees of the One Hundred Forty Realty Trust (the "Trust"), and Grafton and Upton Railroad Company ("G&U") (the Trust and G&U may be referred to collectively as "GURR").

WHEREAS, the Board and GURR are parties to a Settlement Agreement dated February __, 2021, which, among other things:

a. resolved outstanding claims in:
    i. Town of Hopedale v. Jon Delli Priscoli, et al, Massachusetts Land Court No. 20MISC00467 (the "Land Court Matter"); and
    ii. a Petition for Declaratory Order filed by G&U with the federal Surface Transportation Board, Docket No. FD 36464, (the "STB Matter", together with the Land Court Matter, the "Litigations");
b. established an amicable division of property that was the subject of the Litigations, including the partition of 364 West Street into Parcels A, B, C and E as shown on a document entitled Conceptual Lotting Exhibit – January 26, 2021, which is attached hereto as Exhibit 1;
c. provided for the conveyance of land registered under G.L. c. 61 within Parcel A by quitclaim deed(s) from GURR to the Town, or its designee, reserving to the grantor(s) and their successors a slope, grading, and utility easement in the

general location depicted on Exhibit 1, and further reserving to the grantor(s) a 100-foot wide easement for a bridge to facilitate the stream crossing over the Mill River at the general location depicted on Parcel A in Exhibit 1, and an easement for installation of a water supply well(s) or well fields for the benefit of the grantors and their successors;

d. acknowledged that G&U will donate the non-Chapter 61 land within Parcel A to the Town, or its designee, as is, including but not limited to with all existing encumbrances;

e. provided that the Town, in its discretion, may perform any hydrogeological analysis for the purpose of establishing a public drinking water supply well on Parcel A pursuant to 310 CMR 22.00, including, but not limited to, activities to support a Site Screening for Siting a New Public Water Supply and a pumping test pursuant to applicable state regulations (collectively the "Hydrological Analysis") at any location on Parcel A that is more than 400 feet (or 250 feet for a wellfield) from Parcel E, Parcel C, and Parcel B;

f. provided that in the event the Hydrological Analysis performed by the Town indicates the feasibility and financially viability of a public water supply well or wellfield, GURR and its successors will work in good faith with the Town to satisfy Massachusetts Department of Environmental Protection ("MassDEP") drinking water regulations so that a well or well field may be developed; provided however, that nothing herein shall require the Trust, or its successors, to convey any land in Parcel B, Parcel C, or Parcel E to the Town, or its designee, to satisfy GURR's commitment to work in good faith; and

g. provided that GURR shall abandon any water supply well(s) or wellfields it may have installed on any of the subject parcel when a public water supply becomes available and operational on Parcel A, and that GURR shall have the right to connect to the public water supply in consideration for its abandonment of its private well.

WHEREAS, both GURR and the Town have an interest in exploring the water resources in Parcel A to determine whether the aquifer will support either a bedrock well or wells, or a well or well field within the groundwater in the shallow overburden in Parcel A;

NOW THEREFORE, the Parties agree as follows:

1. Description of Work: The Parties agree to work cooperatively and collaboratively for their mutual benefit in: (a) performing a Hydrogeological Analysis to assess the viability of a well or wells for water supply from the groundwater located in the shallow overburden in the areas shown as "Potential Aquifer Material" on the Figure prepared by Environmental Partners Group, Inc., attached hereto as Exhibit 2; (b) performing a Hydrogeological Analysis to assess the viability of a well or wells for water supply from bedrock sources in the three areas shown as "Potential Bedrock Well Location" in Exhibit 2; and (c) performing such other work as they mutually agree to undertake to assess the viability of a water supply and/or public drinking water supply on Parcel A (tasks (a), (b), and (c) collectively are referred to as the "Work").

a. For the avoidance of doubt, it is expressly acknowledged that the Work subject to this Cost Sharing Agreement is restricted to the Hydrogeological Analysis, and does not include costs associated with the permitting, construction, or operation of any water supply well, including, but not limited to, the costs for any other associated infrastructure for any well. All such costs for the permitting (beyond

the Site Screening and pumping test activity), construction, and operation of a water supply well(s), including any public water supply well(s), shall be borne by the Party deciding to pursue to the permitting, construction, and operation of such water supply well(s). Any Party deciding to pursue the permitting, construction, and operation of a water supply well(s) based on the information generated through the Work shall inform the other Parties in writing of their intent to establish a well or wells, including the precise location and anticipated yield from the well or wells.

b. In the event the Parties seek to share any costs for the permitting, construction, and operation of a water supply well beyond the scope of the Work, such activity shall be separately negotiated and subject to a separate cost sharing agreement.

2. Cost Share.

a. "Cost of Work" means the following costs associated with the Work: Joint Contractor (as that term is defined in Paragraph 3.b) fees consistent with the scope and budgets approved under Paragraph 1 and all other direct expenses mutually agreed upon in writing by the Parties. Subject to Paragraph 5 below regarding the Term of the Agreement, the Parties shall pay for the Cost of Work according to the following percentage shares: GURR shall pay 50% and the Commissioners shall pay 50%.

b. The Parties agree that the Joint Contractors shall be retained by, and shall be invoiced by, both G&U and the Commissioners for each Party's respective share of the Cost of Work. Retention of any Joint Contractors shall be in compliance with any applicate state law relating to public contracting.

3. Responsibility for Management Work.

a. In furtherance of the Work and the purpose of this Cost Sharing Agreement, the Parties will coordinate their communications with third parties, including Joint Contractors, and to the extent necessary, MassDEP. Each Party shall have the right to be present in all meetings and telephone conferences with MassDEP with respect to matters involving the Work. All work plans, proposals, reports, and other written communication with MassDEP concerning the Work must be mutually approved in writing in advance by both Parties and will be jointly submitted to MassDEP.

b. The Parties will jointly select and manage technical consultants, advisors, and contractors, including a licensed professional engineer (collectively "Joint Contractors"), to perform the Work. Each Party will have open access to all Joint Contractors and will have the right to be present in meetings and telephone conferences with Joint Contractors. The Parties may jointly determine to terminate a Joint Contractor at any time and without cause.

c. All data, written analysis, reports, or laboratory results performed by or at the direction of a Joint Contractor shall be shared with all Parties.

d. Each Party will give the other Parties at least ten (10) days advance notice of any meeting and 20-hour advance notice (at least one business day) of any telephone conference scheduled with MassDEP or a Joint Contractor relating to matters involving the Work. Each Party, however, may contact the Joint Contractors independently regarding routine matters or to obtain information without providing advance notice to the other Party and without seeking to involve the

other Party in the communication, provided that the Parties shall instruct the Joint Contractors that such contacts are not confidential with respect to the other Party and that both Parties are to be involved in all calls involving non-routine matters and matters of strategic importance.

e. Nothing in Paragraph 3.d. or Paragraph 3.a shall prevent either Party from accepting telephone calls from MassDEP. Each Party shall promptly report to the other Party the substance of any telephone calls or other communications with MassDEP relating to the Work that involve non-routine matters or matters of strategic importance.

4. Unilateral Assessment Work. If either Party unilaterally undertakes assessment activities beyond the scope of the Work, that Party shall be solely responsible for the cost of any such assessment. It is expressly acknowledged that there are Potential Aquifer Material areas show on Exhibit 2 that are located exclusively within Parcel B. Any Hydrological Analysis work performed by GURR on Parcel B is not subject to this Cost Sharing Agreement.

5. Term. This Agreement shall be effective on the date first written above (the "Effective Date") and shall remain in effect until such time as the Work is completed, unless terminated earlier as provided herein. The Agreement may be extended only by written agreement of the Parties.

6. Termination. Any Party may terminate this Agreement upon thirty (30) days written notice to the other Parties. The terminating Party shall remain responsible for all of that Party's share of the Cost of Work incurred through the effective date of the termination. The Agreement may also be terminated for breach pursuant to the terms of Paragraph 8.

7. Internal Costs. Each Party shall be fully responsible for its own internal costs, including by not limited to legal and consulting fees or the internal costs of the Hopedale Water Department, in implementing this Agreement. Such costs shall not be subject to the cost sharing outlined in Paragraph 2.

8. Breach. The Parties agree that in the event of a breach of this Agreement by any Party, the Parties shall attempt in good faith to resolve the dispute through a dialogue between responsible representatives of the Parties. If the Parties are unable to resolve any such dispute during the two-week period immediately following commencement of the discussion, then, at the written request of any Party, the Parties shall attempt to settle the dispute by non-binding mediation under the procedures of REBA Dispute Resolution, Inc. The neutral in any such proceeding shall be selected by and agreed to by both Parties, shall be an expert in the particular matter, and shall be available to serve on short notice. All statements of any nature made in connection with the non-binding mediation shall be privileged and shall be inadmissible in any subsequent court or other legal proceeding involving or relating to the same claim. The mediation process shall continue until the first to occur of: (a) resolution of the dispute; (b) the forty-fifth (45th) day after the Parties agree on the identity of the neutral for such mediation; or (c) a determination by the neutral that resolution is not reasonably possible in a mediation proceeding. The costs of the neutral shall be borne by the Parties jointly on an equal basis. The Parties shall pay their own attorneys' fees, consultant fees, and other costs of mediation. If at the end of the mediation process the Parties fail to resolve the dispute, the Party or Parties claiming breach shall have the right to take any action, in law or equity, available to such Party, including, but not limited to, bringing suit in the Massachusetts Superior Court or other court of competent jurisdiction for injunctive or other relief.

9. Successors and Assigns. This Agreement shall be biding upon the successors and assigns of the Parties. No assignment or delegation to make any payment or reimbursement hereunder will release the assigning Party without prior written consent of the other Parties hereto, which approval shall not be unreasonably withheld.

10. Waiver. The failure of any Party to enforce at any time or for any period of time any of the provision of this Agreement will not be construed to be a waiver of such provisions or of its right thereafter to enforce such provisions and each and every provision thereafter. Termination of this Agreement does not affect the accrued rights and remedies a Party may have prior to such termination.

11. Entire Agreement. This Agreement constitutes the entire agreement with respect to the subject matter addressed herein and supersedes any prior written and/or verbal agreements between the Parties.

12. Third Parties. This Agreement is not intended for the benefit of any third party and is not enforceable by any third party, including, but not limited to, federal and state regulatory authorities.

13. Severability. The provisions of this Agreement are severable and should any provision be deemed for any reason to be unenforceable the remaining provisions shall nonetheless be of full force and effect; provided however, that should any provision be deemed unenforceable by a court of competent jurisdiction, the parties shall negotiate in good faith to cure any such defect(s) in the subject provision(s).

14. Amendments: This Agreement may not be orally modified. This Agreement may only be modified or amended in a writing signed by all of the Parties.

15. Headings. All headings and captions in this Agreement are for convenience only and shall not be interpreted to enlarge or restrict the provisions of the Agreement.

16. Execution in Counterparts; Execution by Facsimile or PDF. This Agreement may be executed in counterparts and all such counterparts when so executed shall together constitute the final Agreement as if one document had been signed by all of the Parties. The Parties agree that facsimile or Portable Document Format ("PDF") signatures shall have the same binding force as original signatures, again as if all Parties had executed a single original document.

17. Applicable Law. This Agreement shall be construed and interpreted in accordance with the laws of the Commonwealth of Massachusetts. This Agreement shall not be construed against any of the Parties, including the drafter thereof, but shall be given a reasonable interpretation under the circumstances. Nothing in this Agreement shall abrogate the application of any applicable federal or state law, including, but not limited to, the Clean Water Act and the Safe Drinking Water Act, to the extent applicable.

18. Notice. All notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, electronic mail with proof of receipt, facsimile, or mailed by certified or registered mail, to the respective addresses as follows:

To the Trust:
One Hundred Forty Realty Trust
c/o Michael Milanoski, Trustee
Grafton & Upton Railroad Company
P.O. Box 952
Carver, MA 02330
mmilanoski@firstcolonydev.com

With a copy to:
Donald C. Keavany, Esq.
Christopher Hays Wojcik &
Mavricos, LLP
370 Main Street, Suite 970
Worcester, MA 01608
dkeavany@chwmlaw.com

To G&U:

Michael Milanoski, President
Grafton & Upton Railroad Company
P.O. Box 952
Carver, MA 02330
mmilanoski@firstcolonydev.com

With a copy to:

Donald C. Keavany, Esq.
Christopher Hays Wojcik & Mavricos, LLP
370 Main Street, Suite 970
Worcester, MA 01608
dkeavany@chwmlaw.com

To the Board of Selectmen:

Brian R. Keyes, Chair
Board of Selectmen
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
bkeyes@hopedale-ma.gov

With a copy to:

Diana Schindler
Town Administrator
Town of Hopedale
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
dschindler@hopedale-ma.gov

To the Board of Water & Sewer Commissioners:

Edward J. Burt, Chair
Hopedale Board of Water & Sewer Commissioners
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
eburt.hd@gmail.com

With a copy to:

Tim Watson, Manager
Town of Hopedale Water & Sewer Department
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
twatson@hopedale-ma.gov

[signatures on following page]

IN WITNESS WHEREOF, the Parties have executed or have caused their proper representatives to duly execute this Agreement as of the Effective Date first written above.

TOWN OF HOPEDALE

By its Board of Selectmen

By_____
Brian Keyes

By_____
Louis Arcudi

By _____
Glenda Hazard

By its Board of Water & Sewer Commissioners

By_____
Ed Burt

By_____
James Morin

By _____

JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as TRUSTEES of the ONE HUNDRED FORTY REALTY TRUST

By_____
Jon Delli Priscoli, Trustee

By_____
Michael Milanoski, Trustee

GRAFTON & UPTON RAILROAD COMPANY

By_____
Michael Milanoski, President

EXHIBIT

A

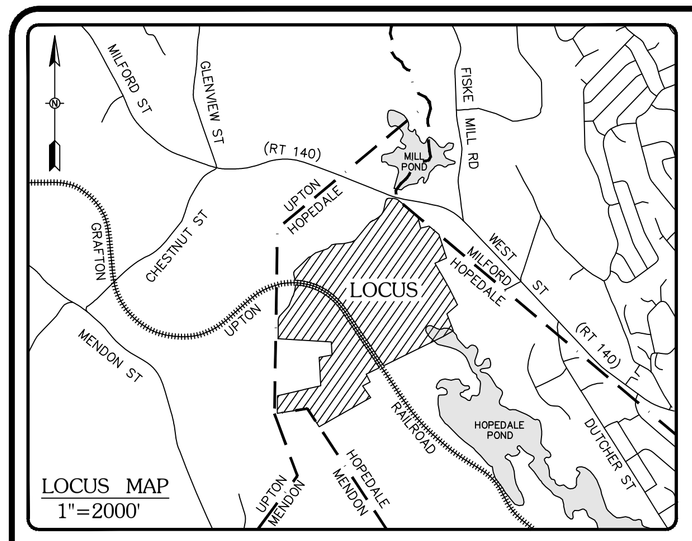


EXHIBIT NOTES

1. THE PURPOSE OF THIS EXHIBIT IS TO ILLUSTRATE THE CONCEPTUAL LOTTING OF A PORTION OF HOPEDALE ASSESSORS PARCEL 2-5-0 & 2-8-0.
2. THE WETLANDS SHOWN HEREON ARE THOSE OF RECORD WITH MASSDEP AND PROMULGATED BY MASSGIS. SOURCE: MASSGIS (BUREAU OF GEOGRAPHIC INFORMATION), COMMONWEALTH OF MASSACHUSETTS EOTSS.
2. THE LEGAL STATUS OF THE STREETS AND/OR WAYS SHOWN HEREON, WHETHER THEY ARE ACTIVE OR ABANDONED, OR WHETHER THEY ARE PUBLIC OR PRIVATE, WAS NOT MADE PART OF THIS SURVEY.

CONCEPT ONLY

MA STATE PLANE COORD. SYSTEM
MAINLAND ZONE - NAD 83

TOWN OF UPTON
TOWN OF HOPEDALE

PARCEL D
AREA=20± AC.

MILL POND

PROPOSED 50' WIDE EASEMENT 3 AREA=3± AC.

PARCEL B
AREA=38± AC.

PROPOSED 100' WIDE BRIDGE CROSSING EASEMENT 6 AREA=0.5± AC.

PROPOSED 50' WIDE EASEMENT 5 AREA=1.5± AC.

WEST STREET (RT 140)

PARCEL C
AREA=13± AC.

18 ACRE TRACT

PARCEL E

300'

1,000'

EASEMENT 1
PROPOSED 300' WIDE EASEMENT
(AREA=7± AC.)

1,000'

GRAFTON & UPTON RAILROAD

EASEMENT 2 PROPOSED 100' WIDE SLOPE & UTILITY EASEMENT (AREA=2.4± AC.)

PARCEL A
AREA=64± AC.

PROPOSED EASEMENT 4 AREA=3± AC.

TOWN OF MENDON
TOWN OF HOPEDALE

HOPEDALE POND

TOWN OF HOPEDALE
TOWN OF MILFORD

DRWN BY:	ZRB		
CHK'D BY:	PSB		
APRVD BY:	WML		

REVISIONS:

REV #	DATE	DESCRIPTION
0	1/26/21	ISSUED FOR AGREEMENT

Graphic Scale
1 inch = 200 feet
0 200 400 600

PREPARED BY:
Engineering Design Consultants, Inc.
32 Turnpike Road
Southborough, Massachusetts
(508) 480-0225

PROJECT:
GRAFTON & UPTON RAILROAD
364 WEST STREET
(WORCESTER COUNTY)
HOPEDALE, MASSACHUSETTS

TITLE:
CONCEPTUAL LAND DIVISION EXHIBIT

PREPARED FOR:
Grafton & Upton Railroad Company
42 Westboro Road
North Grafton, Massachusetts 01536

DATE:
JANUARY 26, 2021

1 OF 1

EDC PROJECT NUMBER
3659

3659 EXH CONCEPTUAL LOTTING R7.DWG

EXHIBIT

B

PARCEL D
20 AC

PARCEL B
38 AC

PARCEL C
13 AC

18 AC TRACT

PARCEL E
59 AC

PARCEL A
64 AC

WEST ST

FISKE MILL RD

COUNTRYSIDE DR

Mill River

250-Foot Zone II
400-Foot Zone I
Potential Aquifer Material
Proposed Bedrock Well Location
Grafton-Upton Railroad (GUR)

Water Bodies
Pond, Lake, Ocean
Wetland

Linear Features
Perennial Stream
Shoreline
Dam

Concord
Boston
Providence
CONNECTICUT
Hartford

Zone I for a Wellfield and a Single Well

Hopedale, Massachusetts

0 200 400
Feet

ENVIRONMENTAL PARTNERS

Exhibit 3

EXHIBIT 3 TO SETTLEMENT TERM SHEET
TEMPLATE OF DEED RESTRICTION

A. The following uses shall not be allowed on land conveyed in this deed:

1. Landfills and open dumps as defined in 310 CMR 19.006;

2. Storage of liquid petroleum products, provided that such storage, is in free-standing containers within buildings or above ground with secondary containment adequate to contain a spill the size of the container's total storage capacity;

3. Land filling of sludge or septage as defined in 310 CMR 32.05;

4. Storage of sludge and septage, unless such storage is in compliance with 310 CMR 32.30 and 310 CMR 32.31;

5. Individual sewage disposal systems that are designed in accordance with 310 CMR 15.00;

6. Storage of deicing chemicals unless such storage, including loading areas, is within a structure designed to prevent the generation and escape of contaminated runoff or leachate;

7. Storage of animal manure unless covered or contained in accordance with the specifications of the United States Soil Conservation Service;

8. Earth removal, consisting of the removal of soil, loam, sand, gravel, or any other earth material (including mining activities) to within six (6) feet of historical high groundwater as determined from monitoring wells and historical water table fluctuation data compiled by the United States Geological Survey, except for excavations for building foundations and associated support / grading infrastructure, roads, parking, rail, or utility works, including stormwater management facilities;

9. Facilities that generate, treat, store, or dispose of hazardous waste subject to MGL 21C and 310 CMR 30.000, except the following:

    i. Very small quantity generators as defined under 310 CMR 30.000;
    ii. Household hazardous waste centers and events under 310 CMR 30.390;
    iii. Waste oil retention facilities required by MGL Chapter 21, Section 52A;
    iv. Water remediation treatment works approved by DEP for the treatment of contaminated ground or surface waters;

10. Automobile graveyards and junkyards, as defined in MGL Chapter l40B, Section 1;

11. Treatment works that are subject to 314 CMR 5.00;

12. Storage of hazardous materials, as defined in MGL Chapter 21E, unless in a free standing container within a building or above ground with adequate secondary containment adequate to contain a spill the size of the container's total storage capacity;

13. Industrial and commercial uses which discharge process waste water on-site;

14. Stockpiling and disposal of snow and ice containing deicing chemicals if brought in from

outside the parcel;

15. Storage of commercial fertilizers, as defined in MGL Chapter 128, Section 64, unless such storage is within a structure designated to prevent the generation and escape of contaminated runoff or leachate;

16. The use of septic system cleaners which contain toxic or hazardous chemicals;

B. In the event a private roadway is not feasible and a public road is required, the Defendants acknowledge their obligation to comply with Massachusetts law with respect to the construction of a public road. In the event a private roadway is contemplated to provide access to the Property said private roadway shall be designed to minimize impacts to the Mill River to the extent practicable following industry standards for stormwater management and stream crossing design, including the US Army Corps of Engineers Stream Crossing Best Management Practices. All plans for the private access roadway and for any "bridge" that will span across the Mill River shall be stamped by a professional engineer, and forwarded to an independent licensed professional engineer selected by the Board of Selectmen who may review such plans at no expense to the Owner. The plans shall be submitted to the Town of Hopedale Board of Selectmen for their review; but shall not require a Board vote to approve such plans. In the event a private roadway is not feasible and a public road is required, the Defendants acknowledge their obligation to comply with Massachusetts law with respect to the construction of a public road.

C. The application of pesticides, including herbicides, insecticides, fungicides, and rodenticides for non-domestic or nonagricultural uses shall in accordance with state and federal standards.

D. For the purpose of preserving groundwater quality to the greatest extent practicable, any development shall provide recharge by storm water infiltration basins or similar systems covered with natural vegetation; dry wells shall be used only where other methods are infeasible. All such storm water infiltration basins and wells shall be preceded by oil, grease, and sediment traps to facilitate removal of contamination. Any and all storm water infrastructure, including all recharge areas, shall be permanently maintained in full working order by the Owner.

E. Prior to occupancy of building, owner shall prepare a Hazardous Materials Management Plan ("HMM Plan"), the Owner shall file the HMM Plan with the Town's Hazardous Materials Coordinator, Fire Chief, and Board of Health. The HMM Plan shall include:

(1) Provisions to protect against the discharge of hazardous materials or wastes to the environment due to spillage, accidental damage, corrosion, leakage, or vandalism, including spill containment and clean-up procedures;

(2) Provisions for indoor, secured storage of hazardous materials and wastes with impervious floor surfaces;

(3) Evidence of compliance with the Regulations of the Massachusetts Hazardous Waste Management Act 310 CMR 30, including obtaining an EPA identification, number from the Massachusetts Department of Environmental Protection.

F. Development will be limited to enclosed buildings/structures so as to avoid outside storage. This does not apply to necessary infrastructure to support buildings / structures.

G. Owner will not be subject to any local permitting; beyond compliance to these conditions, federal laws and regulations, and consistent with established practice the Owner will keep state and local authorities apprised of any development plans by providing notification to the Board of Selectmen and/or Town Administrator.

H. Any of these deed restrictions may be waived by the Board of Selectmen on an individual basis at the Board of Selectmen's sole discretion following a properly posted public meeting upon a finding that enforcement of the specific restriction is not necessary to further the purposes of protecting groundwater or surface water supplies.

I. Nothing contained in this Deed Restriction limits the enforceability of these provisions through an action to a court of competent jurisdiction, including, but not limited to the Massachusetts Superior Court and the Land Court.

EXHIBIT 3

Chapter 32. Claims; Legal Actions

[HISTORY: Adopted as Ch. VI, Secs. 1 and 2, of the Town Bylaws. Amendments noted where applicable.]

§ 32-1. Designation of Selectmen as agents for Town.

The Selectmen shall be agents of the Town to institute, prosecute and defend any and all claims, actions and proceedings to which the Town is a party or in which the interests of the Town are or may be involved.

§ 32-2. Report of legal actions.

The Selectmen in their annual report shall state what actions have been brought against and on behalf of the Town, what cases have been compromised or settled, and the current standing of all suits at law involving the Town or any of its interests.

EXHIBIT 4

Board of Selectmen
Regular Meeting Minutes
February 8, 2021
7:00 PM

Call to order 7:00 p.m. via Zoom Meeting

Chair Keyes convened the meeting at 7:00PM

Pledge of Allegiance

A. Consent Items
    1. Accepting the Donation of $200 to the Bancroft Memorial Library from Frederick G. Oldfield, III, Chair of the Bancroft Memorial Library Trustees, in memory of his Grandmother, Marjorie Hattersley (Letter Attached)

Chair Keyes read the letter provided by Robyn York, Director of Bancroft Memorial Library. Chair Keyes thanked Frederick for his generosity and donation. Selectman Arcudi echoed Chair Keyes sentiments and thanked Frederick for his service, time, and effort he spends with the Library.

Selectman Arcudi made a motion to accept the donation of $200 to the Bancroft Memorial Library from Frederick G. Oldfield, III, Chair of the Bancroft Memorial Library Trustees, in memory of his Grandmother, Marjorie Hattersley. Chair Keyes seconded the motion.

Hazard – Aye, Arcudi – Aye, Keyes – Aye

B. Appointments and Resignations
    1. **7:15 p.m.** Joint Meeting per M.G.L. Chapter 41, §11, with remaining Water Commission members, to consider Appointment of Donald Cooper (No posted meeting for W/S – review letter received)

Town Administrator, Diana Schindler, stated that this item will be passed over and revisited at a future Board of Selectmen meeting due to the Water and Sewer Department not posting a joint meeting agenda.

    2. Appointment of Melissa Butler to the Master Plan Steering Committee (Talent Bank Form Attached)

Selectman Arcudi asked Town Administrator if the Master Plan Steering Committee is a full Board with these appointments, Town Administrator confirmed that after this meeting the Master Plan Steering Committee will have a full Board. Selectman Arcudi thanked Melissa Butler for her participation on the Master Plan Steering Committee.

Selectman Hazard made a motion to appoint Melissa Butler to the Master Plan Steering Committee. Selectman Arcudi seconded the motion.

Hazard – Aye, Arcudi – Aye, Keyes - Aye

    3. Appointment of Kaplan Hasanoglu to the Master Plan Steering Committee

Chair Keyes thanked Kaplan Hasanoglu for his participation on the Master Plan Steering Committee.

Selectman Arcudi made a motion to appoint Kaplan Hasanoglu to the Master Plan Steering Committee. Selectman Hazard seconded the motion.

Arcudi – Aye, Hazard – Aye, Keyes – Aye

C. Public Hearing None

D. New Business*

1. Approve MOU with CMRPC for implementation of EEA grant in the amount of $32,500 (TA to sign) (vote)

Town Administrator briefly explain the EEA (Executive Office of Environmental Affairs) Grant. Schindler stated that this grant opportunity became available, and she has been working with CMRPC to carry out an open space plan. It is stated in the MOU that some of these funds will be applied to Administrative processes to update the Zoning Bylaws. Schindler has informed the Planning Board at a previous meeting and the Planning Board is ready to assist.

Selectman Hazard made a motion to approve the MOU with CMRPC for implementation of EEA grant in the amount of $32,500. Selectman Arcudi seconded the motion.

Hazard – Aye, Arcudi -Aye, Keyes – Aye

2. Collective Bargaining Assignments –
   Selectman Hazard – School, Clerical, Public Works
   Selectman Arcudi – Public Safety (Police, Fire, Call Fire, Dispatch) (Vote)

   Selectman Hazard made a motion to approve the Collective Bargaining Assignments. Selectman Arcudi seconded the motion.

   Hazard – Aye, Arcudi – Aye, Keyes – Aye

E. Old Business

1. Green Communities Fuel Efficient Vehicle Policy (FEVP) Update – Adoption Letter and MOU EEA PAG Round 4 Hopedale MP – *Mimi Kaplan, CMRPC*

Schindler informed the Board of Selectmen that there have been updated State parameters on the FEVP. The Board adopted the FEVP at a previous meeting but due to the parameters being updated, Schindler needs to inform the Board and send a letter to the State to inform them that the Board is aware and approves. The updated parameters by the State are minimal and will mostly affect the Schools. The School Committee addressed and approved this at their previous meeting.

2. COVID Updates

Town Administrator Schindler stated that currently the Town Hall is closed to the public, however, staff hours have increased. There have been ongoing discussions regarding reopening the Town Hall to the public. Once Hopedale is no longer in the "red category" and at "yellow or green" then the Town Hall will reopen to the public. If Hopedale moves to the "yellow" category by Friday, they will reassess Town hall opening at an earlier date. There have been discussions regarding COVID vaccines and vaccine clinics in Hopedale. Schindler has been working with Bill Fisher, Hopedale Health Agent, and Salmon VNA, Hopedale has a contract with, to discuss the possibility of setting up COVID clinics and acquiring refrigeration for the vaccinations. Schindler has been looking at possible CARES Act funding for vaccinations as well.

3. Mediation Updates; *Attorney Peter F. Durning, Special Counsel*

Attorney Durning shared a presentation with the Board and the public to inform them of recent developments and the culmination of the effort to transpose the term sheet that the Board approved at their meeting on January 25, 2021 to the final settlement agreement. Attorney Durning presented slides as a reference, displaying the parcels (A, B, C, D, E) of One Hundred Forty Realty Trust that are being discussed in the settlement agreement. Durning stated that there has been a change to Parcel B since the last meeting, the GU RR has agreed to extend a riparian buffer for the entire southeast portion of Parcel B. The Trust and the GU RR have agreed that the whole 50ft length of the southeastern border will be a no-build/riparian buffer. There will be no physical or vertical structures at this location, there is a provision, that states there can be storm water infrastructures that facilitate infiltration but not treatment and it can have driveways in portion of the area. This is the only change to the slide presented showing the division of the parcels.

Attorney Durning felt that some items need to be reiterated, such as, the Board of Selectmen have always held the authority to act on the Right of First Refusal under G.L. c. 61, 8, nothing about the Special Town Meeting vote or the on-going litigation changes that authority. As the Town's Chief Executive authority, the Board of Selectmen has general authority for conducting and resolving litigation. Lastly, to the extent, the Settlement Agreement with GU RR and the Trust results in the Town of Hopedale acquiring less land for less money than was authorized at Special Town Meeting, no further authorization is required. It is important to recognize the status quo. Though Hopedale has arguments for acquiring the portion of 364 West Street subject to G.L. c. 61, at present that land is controlled by the One Hundred Forty Realty Trust. Both Judge Rubin and Judge Lombardi acknowledged that the substation of the trustees occurred. Rail Roads enjoy broad preemptions under federal law. Part of the reasons motivating the Board of Selectmen to seek a negotiated solution, was to secure better environmental protections for the Town than the Town would have had if the GU RR obtained the land outright. Though railroads enjoy a preemption over State and local regulations, they are bound to follow federal law, including the Clean Water Act and, extent applicable, the Safe Drinking Water Act.

What is important to understand about the proceeding that we are going through tonight is that the Board of Selectmen have already authorized the execution of a settlement agreement at their meeting on January 25, 2021 under the terms sheet. Between January 25, 2021 and today (February 8, 2021), Attorney Durning has been working with Counsel for the GU RR and the Trust and has negotiated some revisions to the term sheet that clarify certain elements in the agreement and provide further enhancements for the Town. Attorney Durning recognized that at the previous meeting he was asked if revisions to the term sheet were possible, he did not state that it was a certainty that any of the terms from the term sheet could be altered because we had entered a binding agreement with the term sheet. The GU RR and the Trust were able to discuss certain modification that would provide additional benefits to the Town.

Attorney Durning discussed the letter received by the Board of Selectmen and dated February 5, 2021, from the Water and Sewer Commissioners that stated the terms of the term sheet are violating their authorities. Durning stated that the Water/Sewer Commissioner's authority is not as vast as asserted in their letter. Given the posture of the conveyance being contemplated by the settlement agreement, which involves the grant of land by a private party to the Town, the concerns about the Commissioner's authority under any eminent domain power are not present here. Commissioners have authority over this land as water supply, at this moment in time, it is not certain that 364 West Street can support a public water supply. The Hopedale Zoning Map for 364 West Street shows that the portions of land discussed is zoned as industrial. This land is not in the Ground Water Protections bylaw district, however, pursuant to the agreement the Trust is agreeing to adopt certain deed restrictions that will impose the same land use controls that are present in the Ground Water Protection bylaw over parcels B and C that will be controlled by the Trust and GU RR.

While the Commissioners do not have the breadth of authority over this parcel as it is presented in their February 5, 2021 letter, the Commissioners and the Water Department do have a significant role to play with the potential development of a public drinking water supply at 364 West Street. Given that both the Town and GU RR have an interest in exploring the land in Parcel A for a potential water supply, the Settlement Agreement includes a provision for a cost sharing agreement that is subject to review and approval by the Water/Sewer Commissioner. In addition, the settlement agreement removes any constraint on the sequence of any exploration for water supply by the Commissioners and the Water Department. There was a mandate in the term sheet that the Town would first look to explore the possibility of a bedrock well. This requirement was removed, as the cost sharing agreement would go into operation, the GU RR and Water Department would explore the viability of wells in the shallow groundwater well or wellfield, they would be conducting this work at the same time while consolidating and sharing that effort.

Attorney Durning pointed out key provisions that are addressed and changes that have been made in the settlement agreement, such as, (1) the Trust or its designee and/or successors shall comply with the applicable health and safety state and federal laws and regulations regarding the development and operation of a water supply well provided however, nothing herein shall be interpreted as subjecting any such work to any local preclearance requirements. (2) The settlement agreement provides a mechanism for the assessment of roll back taxes for a change in use of the land classified under Chapter 61. The value of the roll back taxes will be assessed by the Hopedale Board of Assessors prior to Closing. To preserve the bargained for cost of the land in Parcel A, that the Town and GURR has settled on, the purchase price will be increased by the assessed tax then Trust will be obligated to pay the tax within 5 days. Due to this, the purchase price for parcel A remains consistent with the result of the negotiation. (3) GU RR has proposed donating Parcel D (363R West Street) to the Town. This will be subject to approval at Town Meeting, pursuant to G.L. c. 40, 14. (4) Section 1.e.iv. expressly references the involvement of the Parks Commission and the Conservation Commission with respect to the replication easement area on the east side of Parcel A. (5) The language in Section 5.a stated the Town shall not unreasonably withhold support for GU RR's future application(s) for state and federal grants. (6) the calculation of the survey costs in 5.b is based on a cost-sharing between the acreage in Parcel A for the Town and the acreage in Parcel, C and E, for the Trust. (7) To preserve the status quo and avoid local actions that would constitute impermissible preclearance activity, the Town shall not take any action inconsistent with the terms and intent of this agreement to extinguish, restrict, eliminate or to take by eminent domain the easement areas delineated on Exhibit 1 (Section 5.f). The Town acknowledges that the land subject to this agreement has historically been zoned for Industrial uses within the Town, and further acknowledges that the Defendants relied on the zoning status of this land as allowing Industrial uses as a matter or risk intentionally acquire the subject land and thereafter to effectuate the allocation of Parcel A, B, C, D, and E in this agreement. The Board of Selectmen shall continue to support the zoning of Parcels B, C, and E as permitting Industrial uses as a matter of right. (8) The action to enforce language in section 14 expressly references the ability to bring actions in Massachusetts State Courts for the enforceability of the agreement. There is language requiring the parties to confer in good faith to try and resolve the dispute. There is also a fee shifting provision – the loser in any enforcement action pays the cost of the prevailing party. (9) The Board of Selectmen shall be designated as the decision-making body of the Town for the purpose of implementing the provision of this settlement agreement. The Board of Selectmen shall have the right to consult with any such board, commission, or department as is necessary for carrying out any such terms of this agreement but shall retain decision-making authority to the extent permitted by law.

Selectman Hazard asked Attorney Durning to clarify if there is a timeline and/or deadline, does the Board of Selectmen have time to address some issues that have been brought to them by the Water Department, Conservation Commission, and the Public. Attorney Durning responded that yes, regarding the timeline, pursuant to the terms of the term sheet, the term sheet being a binding commitment, we have until February 9, 2021 to sign and complete the transition from the term sheet to the finalized terms of the settlement agreement. Selectman Hazard asked if the request to post pone the agreement by the Conservation Commission, Water Department and the residents that are suing the Town is possible? Attorney Durning stated that the vote to commit to the settlement agreement was already taken at the January 25, 2021 meeting. Selectman Arcudi asked Attorney Durning that in points 8 and 9, the land will remain zoned as Industrial and that the Town will not seek eminent domain, how will the Town know this in the far future so that does not happen? Also, regarding the donated land, does there have to be a Special Town Meeting, or could this item be put on the Annual Town Meeting? Attorney Durning responded that the donated land item can go on the Annual Town Meeting, a Special Town Meeting is not necessary.

Chair Keyes opened the meeting for public discussion. Keyes acknowledge that Attorney Lurie is on the meeting, Attorney Lurie represents the citizens that are suing the Town regarding the land at 364 West St. Keyes asked Attorney Durning if we should acknowledge and speak with Attorney Lurie at this meeting tonight? Attorney Durning advised it would not be appropriate for Attorney Lurie to speak and advocate on behalf of the residents he represents. He can speak during this meeting. Attorney Lurie stated he represents 10 residents of Hopedale, that he sent a letter to the Board of Selectmen and discussed the letter with Attorney Durning. Attorney Lurie stated that he feels that the Chapter 61 rights of the Town remain in effect and the deal abandons those rights. Attorney Lurie continued to inform the Board, Attorney Durning and Resident of his position and reasons as to why the Town should have moved forward with litigation to obtain the land, as it was the Town's right to obtain the land.

Selectman Arcudi asked Attorney Durning with the pending lawsuit by the residents, does this change the timeline of the settlement agreement? Arcudi fears that a lawsuit could potentially make the agreement with GU RR and the Trust null or void. Then causing the Court to step in and the Town not getting any land. Attorney Durning responded that there are some additional activities that need to occur that are spelled out in the settlement agreement particularly the execution of a purchase and sale agreement, during that period there is going to be an engineer and a survey of 364 West Street so that we get the precise meets and bounds that are intended to be conveyed. These activities typically take 60 days, there will be 60 days before a formal closing. Attorney Durning stated that it would depend on the tactics that Attorney Lurie and the residents he is representing use. What is anticipated in the settlement agreement is that the agreement memorializes the agreement that has been reached between the Town and GU RR. Pursuant to the terms of the settlement agreement the outstanding litigation and the surface transportation board will be closed/dismissed and the current litigation in the land court regarding the rights under chapter 61 will also be dismissed. If another group decides to sue the Town, then it should not affect the timeline of the settlement agreement. Selectman Hazard asked what the consequences would be if the Board of Selectmen choose to postpone per the request of the residents that are suing the Town. Attorney Durning stated that the Trust and GU RR would likely insist on compliance with the terms of the terms sheet and the modifications that we secured through the settlement agreement would be void.

Attorney Durning wanted to stress that about submitting material to the land court Judge. The settlement is not subject to land court approval. This is the determination of three litigants, the Town, the Trust, and GU RR. They have arrived at a resolution of their agreement and their issues. There is not requirement to submit the resolution to the land court for approval. Multiple residents raised concerns regarding they feel that the process was rushed, they felt that the Board did not follow the Town Meeting vote to purchase the land, and that the Water/Sewer and Conservation Commissions should have been involved more. Attorney Durning stated that all the work that the Commissions put into this was utilized and used by the Selectmen. Selectman Arcudi stated that the public was asked what their main concerns are regarding this land if purchasing the land outright was not possible. The Board and Attorney Durning worked to make sure those public requested were met. Their main concerns being water supply protections current and future, parkland protection and conservation, watershed protection.

Several residents have asked if it would be possible to edit the date on the term sheet, to give the Selectmen and the residents more time to review and to avoid possible litigation with Hopedale residents. Attorney Durning responded that, the date is not changing, he feels that changing the date due to the threat of a litigation is warranted.

A resident asked Attorney Durning if the Town were to fail at Land Court and the Surface Transportation Board would there be any recourse? Durning responded that yes, surface transportation board decisions are reviewable by the federal court system, so there could have been an appeal of the decision of the surface transportation board to federal court. Decisions of the land court are appealable to the appeals court and ultimately, the Supreme Judicial Court of MA. That was part of the consideration in this matter, that given how close some of the issues were and how dramatic the swing for the winning and losing party that the likelihood of success and cost of litigation would involve many layers of practice following the resolution.

F. Public and Board Member Comments (votes will not be taken)

G. Correspondence and Selectmen Informational Items (votes will not be taken)

H. Requests for Future Agenda Items:
Selectman Hazard asked to add the Select Board name change to the next agenda.

I. Administrator Updates (In Packet)

J. Executive Session: Motion: To move into Executive Session, pursuant to M.G.L. c.30A, § 21(a) for item # (3): To discuss strategy with respect to collective bargaining or litigation that an open meeting may have a detrimental effect on the litigation position of the public body and the chair so declares. Roll Call Vote
   1. **Purpose: Litigation strategy re: Town v. Jon Delli Priscoli, Trustee, et als, Attorney Durning present.**
   2. **Purpose: Collective Bargaining; All units.**

   Selectman Arcudi made a motion to move into executive session. Selectman Hazard seconded the motion.

   Roll Call Arcudi – Aye, Hazard – Aye, Keyes – Aye

   Chair Keyes dissolved the meeting at 10:42PM

Submitted by:

Lindsay Mercier
Lindsay Mercier, Executive Assistant

Adopted: _____

EXHIBIT 5

STATEMENT ON STATUS OF LITIGATION INVOLVING 364 WEST STREET

To recap the issues involving this property, in October 2020 a Special Town Meeting voted to (1) authorize the Select Board to acquire 130 acres off West Street, owned by the One Hundred Forty Realty Trust and (2) exercise eminent domain to acquire an additional 25 abutting acres. These votes also appropriated funds to pay for these acquisitions. This authorized the Select Board to exercise a Right of First Refusal option on the 130 acres pursuant to General Laws Chapter 61, which the Select Board has sole authority to exercise. After following the statutory process to exercise the option, the Select Board also authorized filing a lawsuit in Land Court against the Trust and the Grafton and Upton Railroad, in order to counter the Railroad's claims that it effectively owns the property and to enjoin the Railroad from clearing the property. Based upon the Land Court judge's recommendation and with assistance of counsel, however, in February 2021, after mediation the Select Board agreed to a Settlement Agreement with the Trust and Railroad – in summary, the Town would receive 65 acres of the 364 West Street property at issue, as well as another 20 acres that the Trust would donate pending Town Meeting authorization, along with various other provisions agreed to with the Trust and Railroad.

In March 2021, a group of Town residents filed a so-called "ten taxpayer lawsuit" in Worcester Superior Court, seeking to prevent the Land Court settlement agreement from being carried out and claiming that the Select Board had no choice but to acquire the entire 155 acres. In November, following an initial ruling in favor of the Town and a decision by the Appeals Court sending the matter back to the Superior Court for further adjudication, the Superior Court ruled that the Select Board could not use the October 2020 Town Meeting votes to carry out the Land Court settlement agreement, as the difference between the real property to be acquired under the agreement and that authorized by Town Meeting was too significant. According to the Superior Court, a new Town Meeting vote to authorize the payment and acquisition of less than the entire parcel of conservation would be required to validate the settlement agreement. The Superior Court also issued a judgment dismissing the remainder of the plaintiffs' claims and finding in favor of the Town.

In addition, however, as an alternative to seeking a new Town Meeting vote, the Superior Court stated - without explanation – that the Select Board could "take the necessary steps to proceed with its initial decision to exercise the Option for the entire Property," notwithstanding that the Land Court litigation on that issue had been dismissed by a stipulation executed by the parties and the option waived as part of the settlement agreement. The Select Board authorized Town Counsel to file a Motion for Clarification to request that the judge explain this portion of the judgment. On December 16, the Superior Court issue a response to the Town's motion. In summary, the Court stated that where the Town's acquisition of 85 acres was a fundamental part of the settlement agreement, unless the Board obtained Town Meeting's authorization to acquire this property, the agreement would not become legally "effective" and the Town could request that the Land Court reopen the Town's previously dismissed lawsuit and seek to enforce the option.

In light of the Superior Court's judgment and clarification, the Select Board has a limited number of options going forward and a Court imposed deadline of mid-February 2022. One course of action for the Select Board would be to call a new Special Town Meeting in January and put the settlement agreement's terms to the voters. Town Counsel, in reliance on the decisions of both the Superior Court and the Appeals Court, has advised that if Town Meeting did vote to authorize the terms of the Land Court settlement agreement (which would require a **2/3 vote** in favor to pass), there would be no further impediments to carrying it out. A favorable vote would allow the Town to acquire the 85 acres of this property and avoid the potential that the Town acquires **none** of the property. A second option would be to attempt to reopen the Land Court litigation and pursue the Town's original claim that it properly exercised its right of first refusal under G.L. c.61, §8. The third option, not favored by the Board, would be to take no further action and allow the status quo to remain with the Railroad in possession of the property.

After deliberation, the Select Board has decided not to call a Special Town Meeting at this time. The Board reached this decision based primarily on three factors:

1. At the October 2020 Special Town Meeting, the voters unanimously supported the acquisition of the 155 acres;
2. While it would require a new Town Meeting vote to formally document the voters' position on acquiring the 85 acres, the Board acknowledges the informal public statements of several hundred voters, through social media and petitions, in favor of instead attempting to pursue further Land Court proceedings to acquire the 155 acres, which the Superior Court has opined may be possible, and in this regard the Board has concluded that the voters at Town Meeting would likely vote against acquiring the 85 acres pursuant to the settlement agreement;
3. In addition, and perhaps most significantly, the current status of the Covid-19 pandemic, with the Delta and Omicron variants rapidly spreading throughout the Commonwealth and the country, makes it a clearly unacceptable public health risk to ask a large number of voters to attend an indoor Special Town Meeting at this time, with an outdoor Town Meeting in January impractical at best.

After further deliberations and carefully considering the options, the Select Board authorized legal counsel to file the necessary motion with the Land Court to request that Court to vacate the stipulation of dismissal and reopen the litigation, so that the Town may proceed with the original action in Land Court to seek a judgment that it is entitled to acquire the 155 acres as authorized by the October 2020 Special Town Meeting.

It must be noted that the Town's prospects in this regard are not known at this time – the Superior Court judgment has no binding effect whatsoever on what the Land Court may do with the Town's attempt to reopen the case. The Board will vigorously present the Town's case to the Land Court, however, and we trust that the Court will consider our well-reasoned position (supported by the Superior Court) and allow us to litigate the Town's rights to the property. Throughout the past 14 months, the Select Board's sole intention has been that the Town acquire as much of the property at 364 West Street as legally and practically possible, to preserve this property in its natural state and for potential public water supply purposes. We have heard the

voices of the residents, and we will continue to seek to acquire this important property as authorized by you, the voters.

EXHIBIT 6

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
VERIFIED PETITION FOR DECLARATORY ORDER

MOTION TO DISMISS PROCEEDING

Grafton and Upton Railroad Company ("GU") hereby requests the Board to dismiss this proceeding. As explained more fully below, GU and the Town of Hopedale, Massachusetts (the "Town") have engaged in mediation and discussions that have resulted in the resolution of the issues described in the Verified Petition for Declaratory Order filed by GU with the Board on November 23, 2020. These issues include matters raised by the Town in the litigation it filed in the Land Court in Massachusetts and the preemption issues raised by GU in the Verified Petition.

In order to afford GU and the Town time within which to reach an amicable resolution, the Board, at the request of GU, held this proceeding in abeyance pursuant to decisions entered on December 4, 2020 and January 28, 2021. The latter decision required GU to file a further status report on or before February 24, 2021.

Pursuant to a Settlement Agreement dated February 8, 2021, GU and the Town have resolved the issues raised by the Town in the Land Court litigation and by GU in the Verified Petition. In accordance with the Settlement Agreement, the Town and GU have filed a stipulation of dismissal with the Land Court. The Settlement Agreement also requires GU to

request the Board to dismiss this proceeding. Accordingly, the Board is respectfully requested to dismiss the proceeding.

Respectfully,

/s/James E. Howard
James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233
jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

Dated: February 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2021, I served a copy of the foregoing Motion to Dismiss on counsel for the Town of Hopedale, Massachusetts by email as follows:

Peter F. Durning
Peter M. Vetere
Mackie Shea Durning, PC
20 Park Plaza, Suite 1001
Boston, MA 02116
pdurning@mackieshea.com
pvetere@mackieshea.com

/s/James E. Howard
James E. Howard

EXHIBIT 7

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
VERIFIED PETITION FOR DECLARATORY ORDER

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request the Board to dismiss this proceeding. Accordingly, the Board is respectfully requested to dismiss the proceeding.

Respectfully,

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Attorney for Grafton and
Upton Railroad Company

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/s/James E. Howard
James E. Howard

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. LAND COURT DEPARTMENT
OF THE TRIAL COURT

TOWN OF HOPEDALE, Plaintiff, v. JON DELLI PRISCOLI and MICHAEL R. MILANOKSI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST, and GRAFTON & UPTON RAILROAD COMPANY, Defendant.	CASE No. 20 MISC 000467 (DRR)

HOPEDALE CITIZENS' MOTION FOR LEAVE TO INTEVENE WITH INCORPORATED MEMORANDUM OF LAW

Elizabeth Reilly and Ten Citizens of the Town of Hopedale[1] ("Hopedale Citizens") seek to intervene as plaintiffs in this case pursuant to Mass. R. Civ. P. 24. The Hopedale Citizens brought an action in Superior Court to enjoin the Settlement Agreement entered into, as a result of this Land Court Action, between the Town of Hopedale's Board of Selectmen and the Railroad Defendants[2] because the key term of the Settlement Agreement – the Town's purchase of a portion of 130 acres of Forestland protected under M.G.L. c. 61 – had not been authorized by Town Meeting vote. The Hopedale Citizens prevailed on this claim to enjoin the property transfer and payment under the Settlement Agreement, first, through entry of a preliminary

[1] Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

[2] Railroad Defendants include Jon Delli Priscoli and Michael Milanoski as the Trustees of the One Forty Realty Trust, and the Grafton & Upton Railroad Company.

injunction from the Massachusetts Appeals Court and, finally and permanently, through the entry of judgment on the pleadings as to that count in Superior Court. The Superior Court ruled that the Settlement Agreement is ineffective due to lack of authorization, which the Board of Selectmen did not and admittedly cannot now obtain. The Superior Court also enjoined any land clearing activity by the Railroad Defendants until January 31, 2022 to give the Town time to decide whether to seek enforcement of its c. 61 Option to acquire the Forestland, which would require rescission of the Settlement Agreement and reopening this action. The Town has now so decided by filing its Motion to Vacate the Stipulation of Dismissal in this case.

It is beyond dispute that the parties have returned to this Court solely because of the Hopedale Citizens' efforts to protect the public's interest in the Forestland and because of their successes in that effort. The Town's Motion to Vacate and the Railroad Defendants' Opposition to that Motion, each of which refer to and rely heavily upon the Hopedale Citizens' litigation, make this abundantly clear. In fact, the Railroad Defendants' Opposition reveals for the first time publicly that the Settlement Agreement was amended in direct response to the Hopedale Citizens' Notice to Sue by insertion of a severability provision specifically designed to impede the public's ability to obtain relief from the illegal terms of the Settlement Agreement.

Now, to effectuate the injunction obtained by the Hopedale Citizens and to preserve the subject Forestland that the injunction intends to protect, the presence of the Hopedale Citizens is critical and they should be permitted to intervene in order to (1) vacate the Stipulation of Dismissal which was entered only as part of the ineffective Settlement Agreement, (2) obtain a preliminary injunction against any land clearing activities by the Railroad Defendants pending disposition of the claim to vacate the dismissal, (3) obtain a declaratory judgment that any settlement in this case between the Town and the Railroad Defendants cannot include the release,

waiver or transfer of any part of the Town's c. 61 property interests without Town Meeting authorization, and (4) obtain a declaratory judgment that the Town's ultimate purchase price of the Forestland must be reduced due to the Railroad Defendants' unlawful land clearing of the Forestland that it commenced during the pendency of the Hopedale Citizens' action and while subject to the Appeals Court injunction.

FACTUAL AND PROCEDURAL BACKGROUND[3]

1. The Town's Exercise of its c. 61 Option and Subsequent Settlement Agreement

On July 9, 2020, the Railroad entered into a Purchase and Sale Agreement with the Trust-owner of 130 acres of land in the Town of Hopedale classified as Forestland under c. 61 and provided the Town with a Notice of Intent, as required under c. 61, to sell the property for $1,175,000.[4] VIC ¶ 22. This created an irrevocable first refusal option to the Town to purchase the Forestland for $1,175,000, pursuant to c. 61, § 8 ("Option"). The Town took all necessary steps to exercise the Option within the statutory 120 days. The Town informed the Property owner and the Railroad that it was considering exercise of its Option and on October 24, 2020, a Special Town Meeting was attended in person by over 400 citizens of Hopedale to appropriate funds to exercise the Option. Article 3 of the Town Meeting Warrant presented the following question:

> To see if the Town will vote to acquire, by purchase or eminent domain, certain property, **containing 130.18 acres**, more or less . . . and in order to fund said acquisition, raise and appropriate, transfer from available funds, or borrow pursuant to G.L. c. 44, §7, or any other enabling authority, a sum of money **in the amount of One Million One Hundred and Seventy-Five Thousand Dollars ($1,175,000.00)**, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, said property **being acquired pursuant to a right of first refusal in G.L. c. 61, §8**, which

[3] Hopedale Citizens rely on their Verified Intervenor Complaint and cite thereto as ("VIC, ¶ __").

[4] An additional 25 acres of the property are wetlands that run through a portion of the Forestland (the "Wetlands") and are excluded from c. 61 classification, together the "Property". VIC ¶ 12.

> right is subject to exercise by a vote of the Board of Selectmen, **such acquisition to be made to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes** . . .

VIC ¶ 41 (emphasis added).

Residents of the Town spoke overwhelmingly in favor of acquiring the 130.18 acres of Forestland for use by the public for conservation and recreation. The Finance Committee recommended approval of Article 3 and informed the Town Meeting of a gift offer of $750,000 from the Hopedale Foundation to assist in the exercise of the Option. Chairs of the Conservation Commission and Water and Sewer Commissions spoke in favor of exercising the Option. VIC ¶ 42.

However, the Motion on Article 3 was not to authorize acquisition of the Forestland by eminent domain or purchase. Rather, the Motion was only "to appropriate . . . $1,175,000, less amounts received by gift, to pay costs of acquiring certain property, containing 130.18-acres". VIC ¶ 43, Ex. 12. The Motion only to appropriate funds was made by the Board Chairman advisedly because the decision to exercise the c. 61 Option resides with the Board, while the appropriation of funds resides with the Town Meeting. The Motion passed unanimously. Id.

By contrast, Town Meeting also voted on a motion on Article 5, which was to see if the Town would "take by eminent domain pursuant to Chapter 79" the 25-acre Wetlands on the Property and to appropriate the funds for the acquisition. A Board member "moved to purchase, or take by eminent domain pursuant to Chapter 79" the 25 acres "and in order to fund said acquisition, borrow pursuant to G.L. c. 44, § 7 . . . the sum of $25,000". That motion also passed unanimously. VIC ¶ 44, Ex. 12.

Through these two votes, Town Meeting (1) appropriated funds for the Board to exercise the Option on the 130-acre Forestland; and (2) authorized the taking and appropriated funds to

take the 25-acre Wetlands. The Town Meeting did not authorize the Board to acquire the Forestland outside of the exercise of the Option, which the Board independently held authority to do under c. 61.

On October 30, 2020, the Board voted to exercise the Town's Option to acquire the 130-acre Forestland, consistent with the Town Meeting vote. VIC ¶ 46. On November 2, 2020, the Town recorded notice of the exercise of its Option and the taking of the Wetlands in the Worcester South District Registry of Deeds. VIC ¶ 48, Ex. 14.

Meanwhile, the Railroad Defendants took a series of illegal maneuvers to seize control of the Forestland and strip the Town of its c. 61 Option, and began clearing the Forestland. VIC ¶¶ 30-34. On October 28, 2020, the Town sued the Railroad in Land Court in this action to seek a judicial order that the Town retained its Option despite the Railroad's shifty actions and to enjoin further land clearing. Id. ¶ 47. On November 23, 2020, the Land Court denied the Town's request for a preliminary injunction in a brief, narrow order finding expressly that the Town is entitled to a right of first refusal but that it was unclear whether or when that right had triggered or ripened and that given the Railroad's representation that no further land clearing would occur, there was no risk of harm. Id. ¶ 54.[5]

Thereafter, the Board and the Railroad engaged in mediation and entered into a Settlement Agreement that is irreconcilable with Town Meeting authority and purpose and would expend funds that were not authorized by Town Meeting. The Board agreed to purchase 40 acres of the Forestland for $587,500. The Town Meeting, however, appropriated funds for the

[5] The Superior Court has since ruled that the Town retains its full rights under c. 61 and that it may now seek to enforce those rights. See Orders dated November 4, 2021 (attached hereto as Exhibit 1) and December 14, 2021 (attached hereto as Exhibit 2) (Goodwin, J.).

exercise of the Town's c. 61 Option to acquire the full 130.18-acre Forestland but did not authorize any land acquisition or expenditure outside the exercise of that Option.

2. The Hopedale Citizens' Superior Court Action and Entry of Judgment as to Count I, Enjoining and Invalidating the Settlement Agreement

On March 3, 2021, the Hopedale Citizens filed their action in Superior Court to enjoin the execution of the Settlement Agreement and require the Town to enforce its full c. 61 option because the key provision of the Settlement Agreement lacked authorization – namely, the Board of Selectmen only had authority from Town Meeting to exercise the Option for the entire 130 acres of Forestland and did not have the authority to acquire any lesser portion of the Forestland. The Hopedale Citizens brought these claims against the Town of Hopedale, the Board of Selectmen and the Railroad Defendants. The Hopedale Citizens' Complaint included a claim against the Railroad Defendants and the Town to enforce the c. 61 rights because the Railroad Defendants had violated c. 61 in transferring property interests of the Forestland.[6]

On March 25, 2021, the Single Justice of the Appeals Court (Meade, J.) enjoined the Town from paying any funds or transferring any property interests under the Settlement Agreement, reversing the Superior Court's (Frison, J.) initial denial of that request. While the Appeals Court order remained in force, the Railroad Defendants **again** began clearing the Forestland. On September 9, 2021, the Superior Court (Goodwin, J.) entered a Temporary Restraining Order against the Railroad Defendants and on September 24, 2021 entered a Preliminary Injunction against the Railroad Defendants from any further land clearing.

On November 4, 2021, the Superior Court (Goodwin, J.) issued its decision on the parties' cross-motions for judgment on the pleadings, entering judgment for the Citizen Plaintiffs

[6] The Superior Court agreed that the Railroad Defendants attempted to circumvent the Chapter 61, § 8 process (Ex. 1 at 11) but held that the Hopedale Citizens lacked standing to force the Board to enforce the Town's c. 61 rights against the Railroad Defendants' violations.

on Count I, permanently enjoining the execution of the Settlement Agreement without Town Meeting authorization and entering judgment against the Citizen Plaintiffs on Counts II and III for lack of standing. Judge Goodwin also extended the injunction against the Railroad Defendants for sixty (60) days to give the Town time to decide whether to seek Town Meeting authorization of the Settlement Agreement or seek to enforce the Town's full c. 61 rights. Ex. 1.

Judge Goodwin's order as to Count I is critical to this Land Court action. Judge Goodwin made findings of fact and law that are now law of the case and must be respected, including, that "it is undisputed that the Town attempted to carry out the steps necessary to exercise its Option" (Ex. 1 at 5); that the "Railroad Defendants' attempt[ed] to circumvent Chapter 61, § 8, process by purporting to acquire only the 'beneficial interest' in the forest land while undertaking commercial operations . . . [and] court cannot ignore Railroad Defendants' initiation of land clearing operations after the Town issued a notice of intent" (id. at 11); and that the Town could either "seek the Town Meeting authorization necessary to validate the Settlement Agreement or [] take the necessary steps to proceed with its initial decision to exercise the Option to the entire Property" (id. at 12). The Town was uncertain about the ruling and whether Judge Goodwin had ruled that the Town did, in fact, retain its c. 61 rights. The Court granted the Town's assented to request to extend the injunction to January 31, 2022 while the Town filed a Motion for Clarification.

On December 14, 2021, Judge Goodwin issued an Order of Clarification for the Town, holding that the Settlement Agreement "provided that in exchange for the Railroad voluntarily selling a portion of the forest lands to the Town, the Town would cease efforts to enforce G.L. c. 61, s. 8 Option" and that, accordingly, "the Settlement Agreement would fail to take effect" if the Board does not obtain authorization at Town Meeting and the Town would retain "the right to

continue attempting to enforce the Option". Ex. 2. at 1-2. To remove any doubt as to the Court's order it stated point blank: "the Board exceeded its authority when it unilaterally entered into that agreement without Town Meeting approval of the reduced acquisition. Therefore, **the Settlement Agreement is not effective**." Id. at 2 (emphasis added). And in note 3, the Court wrote especially that the Railroad cannot get all of the benefits of the agreement and give nothing up in exchange, a result that "would be unjust, to say the least." Id. at n. 3. Going further than before, the Court ruled that the Town, if it did not or could not, obtain Town Meeting authorization for the Settlement Agreement, that "the Town could seek recission of the Settlement Agreement". Id.

The Town, thereafter, on December 30, 2021, filed in this Court, its Motion to Vacate the Stipulation of Dismissal. The Town also sought an extension of the injunction in its Motion to Vacate.

ARGUMENT

The Hopedale Citizens seek to intervene in this case pursuant to Mass. R. Civ. P. 24(a)(2) because the Hopedale Citizens claim a public interest to the property which is the subject of the action and are so situated that the disposition of the action may impair or impede their ability to protect that interest and pursuant to Rule 24(b)(2), which applies because the Hopedale Citizens' "claim or defense in the main action have a question of law or fact in common" with the Town's claims. The Court has "broad discretion" when deciding to permit intervention. Cruz Mgmt. Co. v. Thomas, 417 Mass. 782, 785 (1994). In exercising such discretion, the Court shall consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Mass. R. Civ. P. 24(b)(2). See, e.g., Town of Wakefield v. Att'y Gen., 334 Mass. 632 (1956) (allowing twenty-one taxpayers to intervene where nature of Town's title

in property was in dispute); Valley Green Grow, Inc. v. Town of Charlton, 18-misc-000483, (Mass. Land. Ct. Nov. 8, 2018) (Foster, J.); aff'd, 99 Mass. App. Ct. 670 (2021) (allowing signer of ballot initiative to intervene because there was "some question as to whether the Town will take an active role in defending the Initiative" and they may otherwise be unable to protect their interests); Samuelson v. Town of Orleans Planning Bd., 10-misc-433554 (Mass. Land. Ct. Sept. 23, 2010) (Trombly, J.); aff'd, 86 Mass. App. Ct. 901 (2014) (allowing beneficial owners of property to intervene as defendants on Planning Board appeal because "they would be the most diligent and zealous defenders of the action, possibly even more so than that Board"); Decoulos v. City of Peabody, 00-misc-261929 (Mass. Land. Ct. Nov. 9, 2000) (Lombardi, J.); aff'd 2004 WL 1656488 (Mass. App. Ct. July 23, 2004) (allowing landowner to intervene because "the City cannot adequately represent the interests of [the landowner]").

1. **The Hopedale Citizens' successes in the Superior Court Action necessitate their presence in this action.**

A status hearing on the Town's Motion to Vacate was held in this Court on January 11, 2022. Counsel for the Hopedale Citizens appeared at that hearing and the Court invited counsel for the Hopedale Citizens to participate. Counsel further indicated that it was considering intervening in this case to protect the Hopedale Citizens' gains.

It is beyond dispute that the parties have returned to this court solely because of the fruit of the Hopedale Citizens' labors to protect the public's interest in the Forestland. Both the Town's Motion to Vacate and the Railroad Defendants' Opposition to that Motion make repeated references to the Hopedale Citizens' action and the effect that judgment on Count I has on the respective parties' rights. The Railroad Defendants' alone mention the "Citizen Suit", the "10-taxpayers" or the Superior Court's ruling on Count I **at least thirty-seven (37) times** in their short Opposition to the Town's Motion to Vacate.

Not only is the Hopedale Citizens' Judgment the catalyst to reopen this litigation, but the public now knows, for the first time, that the ill-fated Settlement Agreement was amended in direct response to the Hopedale Citizens' Notice to the Board and the Railroad Defendants that the Settlement Agreement would be invalid, *inter alia*, because the lack of authorization from Town Meeting for the Town to purchase the inferior portion of the Forestland.

The President of the Railroad, Michael Milanoski, admits to the Railroad Defendants' nefarious motivations and tactics. On February 7, 2021, the Hopedale Citizens sent notice of the negotiated Term Sheet's deficiencies, including that the "[Board] did not have the authority to enter into a contract for an inferior fraction of the [Forestland] for the price set forth in the Term Sheet, or the outlying property . . . These terms are inconsistent with and contradictory to the Town Meeting vote and are therefore invalid." Keavany Aff. Ex. 4 at 5. Milanoski admits that the parties reduced the final agreement to writing the next day, on February 8, 2021. Milanoski Aff. ¶ 7. Milanoski lays it bare, explaining that "the [Railroad] defendants insisted on the inclusion of a severability clause in the Settlement Agreement because it was clear that some town residents and public officials were not in favor of the Town settling with the [Railroad] defendants and that someone may attempt to challenge the Settlement Agreement . . . The severability clause was added at the end of negotiations, one or two days before the Settlement Agreement was executed." Id. ¶ 9 (emphasis added).[7] The Railroad Defendants knew the key provision was unauthorized but rather than add a clause that the property's acquisition would be subject to approval by a majority vote at Town Meeting, as they did for another non-Forestland

[7] It is worth noting that the inclusion of the severability provision appears to have been inserted after Judge Lombardi's involvement had ended and there is no indication that he was aware or approved of it.

parcel[8], the Railroad Defendants "insisted" on a severability clause directly intended to impede the Hopedale Citizens' from enforcing the public's rights against unauthorized expenditures and the preservation of the Forestland.[9]

Accordingly, because the Railroad Defendants clearly intend to relitigate the Hopedale Citizens Suit and because this case will include close examination of the Railroad Defendants' illegal maneuvering as it relates to the invalid Settlement Agreement – including that it was intended to carve out the public's enforcement of its rights – the Hopedale Citizens' must have a voice in the Court. What the Railroad Defendants attempted to do was prep the field for the outcome it now nakedly advances, the very outcome that the Superior Court has already chided as "unjust, to say the least". The Hopedale Citizens must be allowed to participate.

2. <u>The Hopedale Citizens' request for intervention is timely</u>.

The Superior Court issued its Order on the Town's Motion for Clarification on December 14, 2021 and the Town of Hopedale filed its Motion to Vacate the Stipulation of Dismissal in this Court on December 30, 2021, less than one month ago. Following the Town's filing of its Motion, the Railroad Defendants refused to agree to extend the injunction against its Forestland destruction pending action by this Court on the Motion to Vacate. The Town then filed, on January 11, 2022, its Emergency Motion to Extend the Injunction in the Superior Court and the Hopedale Citizens joined that motion on January 13, 2022. The Railroad Defendants opposed

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[8] The parties did, in fact, add a clause to the Settlement Agreement that acceptance of the donated, outlying parcel is "subject to approval by a majority vote at Town Meeting". <u>See</u> Milanoski Aff. Ex. 2, Settlement Agreement § 1(d)(i) ("Subject to approval by a majority vote at Town Meeting pursuant to G.L. c. 40, § 14…"). The intentional decision to not add this to the acquisition of the smaller portion of the Forestland is all the more glaring.

[9] Even if the severability provision were legitimate and not designed to inoculate an unlawful provision, the entire Settlement Agreement is a nullity because the material terms, the Town's payment of $587,500 and acquisition of 40 acres of Forestland, are unlawful and the Agreement is void for lack or failure of consideration. <u>Abrams v. Board of Sudbury</u>, 76 Mass. App. Ct. 1128 (2010); <u>Carrig v. Gilbert-Yarker Corp.</u>, 314 Mass. 351, 357 (1943). As held by the Superior Court, "the Settlement Agreement is not effective" and enforcement of the severability clause "would be unjust, to say the least." Ex. 2 at 2, n.3.

the motion and claimed that the Superior Court has no jurisdiction over them, believing that they are immune from the powers of the Courts. See Reilly, et al. v. Town of Hopedale, et al., Railroad Defendants' Opposition to Town's Emergency Motion to Extend Injunction (Dkt. No. 53). This Motion to Intervene is timely given the speed of recent events, that the hearing on the Motion to Vacate is scheduled for January 24, 2022 and the Superior Court's injunction against the Railroad's land clearing activities expires January 31, 2022.

3. The Hopedale Citizens have standing to seek protection of the injunction they obtained in Superior Court.

The Hopedale Citizens have standing to continue to protect the public's interest in the Forestland and Town expenditures through seeking to vacate the stipulation of dismissal and recission of the Settlement Agreement and through the extension of the injunction against clearing of the Forestland pending disposition of the public's rights therein via G.L. c. 40, § 53 and mandamus. [10] See Nickolas v. City of Marlborough, 32 Mass. L. Rptr. 125, at *2-3 (Mass. Super. Ct. May 9, 2014) (residents have standing to seek relief in the nature of mandamus that the city must comply with alleged legal duties concerning public park before constructing a proposed senior center); Harris v. Town of Wayland, 392 Mass. 237 (1984) (residents sought mandamus and declaratory relief regarding sale of town land for purpose of constructing elderly and low-income housing; court held that purported authorization by majority vote of the town for

[10] The Hopedale Citizens recognize that under c. 40, § 53, ten taxpayers lawsuits must be brought in the Superior Court. However, the Hopedale Citizens are following the lead of, and joining, the Town of Hopedale, which filed its Motion to Vacate the Stipulation of Dismissal in this Court. At any rate, this jurisdictional issue can easily be cured by one of two ways, either: (1) transfer of this action to the Superior Court for consolidation with the Hopedale Citizens' Action, a request that has already been made by the Hopedale Citizens, or (2) this Court could seek an interdepartmental assignment with retroactive effect to hear the Hopedale Citizens' claims under c. 40, § 53. See, e.g., Ritter v. Bergmann, 72 Mass. App. Ct. 296, 301, n. 9 (2008) (holding that even if the Land Court was without jurisdiction, it would not be fatal to the judgment, "the Chief Justice for Administration and Management could cure any such defect, *nunc pro tunc*" because "The overriding principle applicable here is that the courts of the Commonwealth constitute a single system for the administration of justice in conformity to law, promptly, and without delay.").

sale was invalid). See also Reilly v. Town of Hopedale, et al. No. 2185-cv-00238 (Mass. App. Ct. Mar. 25, 2021) (Meade, J.) (attached hereto as Exhibit 3); Order on Motion for Judgment on the Pleadings (Goodwin, J.), Ex. 1; Order on Motion for Clarification (Goodwin, J.), Ex. 2; Hopedale Citizens' Memorandum in Opposition to Railroad Defendants' Motion for Judgment on the Pleadings on Standing (Dkt. No. 29.3), at pp. 8-10.

The Railroad Defendants reluctantly now "agree to abide" by the injunction against destroying the Forestland until February 14, 2022. This is just more manipulation of the Court from the Railroad Defendants. Rather than respect the judicial process and agree to maintain the status quo until resolution, the Railroad Defendants place a unilateral, arbitrary deadline on the Court to act. To guard against such manipulation, the Hopedale Citizens must be permitted to request that the Court enjoin the Railroad Defendants' thirst to destroy the Forestland before the parties' rights thereto can be finally resolved.

The Hopedale Citizens likewise have standing under c. 40, § 53 to (1) seek protection against any subsequent settlement efforts that would release, waive or transfer any of the Town's c. 61 property interests without Town Meeting authorization[11] and (2) obtain an order that the final purchase price of the c. 61 Forestland must be reduced due to the damage already caused by the Railroad Defendants when they cleared a significant swath of the Forestland to construct an access road and construction staging ground. Town of Brimfield v. Caron, 2010 WL 94280, *10-11 (Mass. Land Ct. Jan. 12, 2010), *after trial*, 2015 WL 5008125 *4-8 (Mass. Land Ct. Aug. 21, 2015) (ordering that Town has right to purchase forestland at a price adjusted for value of minerals removed from forestland by putative buyer prior to issuance of preliminary injunction); Oliver v. Town of Mattapoisett, 17 Mass. App. Ct. 286, 287-88 (1983) (affirming standing under

[11] The Hopedale Citizens raised this issue in the Superior Court action but the Court did not reach it.

c. 40, § 53 for ten taxpayers to challenge a town meeting vote to grant an easement in Town land to a private party).

To protect the public's vital interest in the Town's c. 61 Forestland and ensure that any Town funds expended are authorized, the Hopedale Citizens are critical parties in this matter. For this reason and because the Town may not adequately protect the public's rights in the Forestland and it is not yet clear whether, or to what extent, the Town will reduce the purchase price to take into account the Railroad Defendants' illegal destruction of a portion of the Forestland, the Hopedale Citizens should be permitted to intervene under Rule 24(a)(2) and 24(b)(2). It is clear that no party other than the Hopedale Citizens is certain to fully protect the Forestland, the Town's property rights and safeguard the Town's coffers.

A copy of the Hopedale Citizens' proposed Intervenor's Complaint is provided herewith, in accordance with Mass. R. Civ. P. 24(c).

WHEREFORE, the Hopedale Citizens respectfully requests allowance of this motion and leave to file the enclosed Intervenor's Complaint.

INTERVENOR-PLAINTIFFS,

Respectfully submitted,

ELIZABETH REILLY, CAROL J. HALL, HILARY SMITH, DAVID SMITH, DONALD HALL, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMING, and JANICE DOYLE

By their attorneys,

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Dated: January 20, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon the attorney of record for each other party by email on January 20, 2022.

Harley C. Racer

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.20MISC 00467

TOWN OF HOPEDALE	)	
	)	
Plaintiff	)	**DEFENDANTS' OPPOSITION**
vs.	)	**TO PLAINTIFF'S MOTION TO**
	)	**VACATE STIPULATION OF**
GRAFTON & UPTON RAILROAD COMPANY, et al.	)	**DISMISSAL WITH PREJUDICE**
	)	
Defendants	)	

Defendants, Grafton & Upton Railroad Company ("G&U") and Jon Delli Priscoli and Michael R. Milanoski, as Trustees of the One Hundred Forty Realty Trust (the "Trust") (collectively, the "G&U Defendants"), oppose plaintiff Town of Hopedale's ("Hopedale" or "Town") Motion to Vacate the Stipulation of Dismissal and request for injunctive relief.[1] The Town's Motion under subsections (b)(5) and (b)(6) of Mass. R. Civ. P. 60 is based on two faulty factual premises: First, "The Town is now faced with the prospect of getting nothing from its effort to compromise and resolve its dispute with the Railroad, and the Railroad getting everything…." Motion at p.9; and (2) "Here, the November 4 Decision of the Superior Court renders the Town incapable of acquiring the land contemplated under the settlement agreement." Id., at p. 11. As set forth below, since both of these factual premises are demonstrably false, the Town has failed to meet its burden under Rule 60(b) and its Motion must be denied.

SUMMARY OF OPPOSITION

- Rule 60(b)(5) does not apply to the Judgment at issue because the Judgment does not have prospective effect. "[N]early every Circuit Court of Appeals to decide the issue has held that a dismissal is not a judgment with prospective application." Comfort v. Lynn Sch. Comm., 541 F. Supp. 2d 429, 433 (D. Mass. 2008).

[1] While the Town cannot establish entitlement to injunctive relief against the G&U Defendants, the G&U Defendants will agree to abide by the language of the limited injunction issued by the Superior Court through February 14, 2022, or until this Court issues its decision on the Town's Motion, whichever occurs first.

- "Rule 60(b)(6) has an extremely meagre scope and requires the showing of compelling or extraordinary circumstances. Extraordinary circumstances may include evidence of actual fraud, a genuine lack of consent, or a newly-emergent material issue." DeMarco v. DeMarco, 89 Mass. App. Ct. 618, 621-622 (2016)(internal quotations and citations omitted). The Town has failed to advance any compelling or extraordinary circumstance entitling it to relief under 60(b)(6).

- There has been no failure of consideration since the Town has already received, and acknowledged the receipt and adequacy of all consideration called for by the Settlement Agreement.

- The underlying Settlement Agreement is absolutely and unequivocally effective and enforceable. The Judgment[2] that entered in Superior Court did not invalidate the Settlement Agreement, because 10-Taxpayers who were not parties to the agreement had no standing to challenge the validity of the agreement.

- The Town continues to have a contractual right to acquire 64 acres+- of land at 364 West Street for the sum of $587,500 (and to receive a donation of 20 acres+- at 363 West Street). The Town's decision not to consummate this acquisition does not excuse it from the Settlement Agreement. The G&U Defendants remain ready, willing and able to convey these properties to the Town.

- The ten-taxpayer Superior Court litigation (the "Citizens Suit") which enjoined the Town from using funds appropriated at an October 2020 Special Town Meeting to acquire the property was actually anticipated by the Town before the Settlement Agreement was executed and before the Stipulation of Dismissal was executed and docketed. The issue presented by the ten-taxpayer lawsuit is not newly emergent.

- Assuming arguendo, the Town does not go forward with the purchase, there remains ample consideration for the Settlement Agreement: the G&U Defendants remain bound by, inter alia, deed restrictions and build-out restrictions, including an Army Corp. of Engineers deed restriction on Parcel A and Parcel D, which contain conservation-based covenants preserving the subject land in its natural condition in perpetuity.

- The Settlement Agreement contains a severability clause in Section 10 that the parties negotiated and bargained for.

- Allowing the Town's Motion would greatly prejudice the G&U Defendants who, in reliance on the dismissal of this case, dismissed their Petition to the Surface Transportation Board which sought to establish federal preemption and have incurred significant development-related expenses.

[2] A true and accurate copy of the Judgment that entered in the Citizens Suit is attached to the Affidavit of Donald C. Keavany, Jr.("Keavany Aff.") as Exhibit 1.

PROCEDURAL HISTORY

On November 2, 2020, the Town filed this lawsuit claiming it possessed an enforceable right of first refusal option pursuant to G.L.c. 61 to acquire 130 acres+- of industrial-zoned forestland located at 364 West Street in Hopedale that was owned by the Trust. G&U was (and remains) the 100% beneficiary of the Trust. The Town claimed that its Board of Selectmen ("Board") had effectively voted to exercise the Town's Chapter 61 right of first refusal to acquire the 130 acres+- of forestland and further, that a Special Town Meeting in October 2020 had appropriated $1,175,000 for the purchase of this forestland.

G&U and the Trust denied that the Town possessed a valid or enforceable Chapter 61 right of first refusal to acquire the 130 acres+- of forestland and that any such claims were preempted by federal law. G&U filed a Petition for Declaratory Order before the federal Surface Transportation Board ("STB") on November 22, 2020 asserting that the Town's claim was preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 *et seq.*, specifically, 49 U.S.C. §10501(b). See Affidavit of Michael R. Milanoski, filed herewith (Milanoski Aff."), ¶¶2-3. G&U asserted that the STB has exclusive jurisdiction over transportation by rail carriers and that the ICCTA expressly preempts state law remedies with respect to rail transportation and that as a result, the Town's Chapter 61 claim was preempted. Id.

The Town moved for a Preliminary Injunction, which this Court denied on November 23, 2021. In her endorsement denying the Town's Motion, the Court (Rubin, J.) wrote in part: "Without a clear trigger date for the Town's exercise of its option, I cannot determine whether the Interstate Commerce Commission Termination Act preempts the Town's right to purchase land which the Defendants contend is land intended for use as transportation by rail." At the

hearing for preliminary relief, the Court noted that the issues before it were complex and uncertain, and strongly encouraged the parties to pursue a mediated resolution.[3]

On November 24, 2020, this Court ordered the parties to attend a mediation screening. As a result of mediation screening, the Parties agreed to mediate 1) the Town's disputed claim that it possessed a valid and enforceable Chapter 61 option to acquire the 130+- acres of forestland at 364 West Street, 2) the Town's separate claim to acquire by eminent domain an additional 25 acres+- of land owned by G&U at 364 West Street and 3) the G&U's preemption defense to the Town's claim as set forth in the Petition for Declaratory Order filed with the STB.

Retired Land Court Justice Leon Lombardi mediated the Parties' disputed claims over two days in January 2021. On the second day of mediation, the Parties reached an Agreement to settle the Town's disputed Chapter 61 claim, its separate disputed eminent domain claim, and G&U's STB Petition. The Parties negotiated the final terms of the Settlement Agreement during the period January 21, 2021 to February 8, 2021, and finalized the terms of the formal Settlement Agreement on February 8, 2021, a true and accurate copy of which is attached as Exhibit 2 to the Milanoski Aff. Among the many provisions of the Settlement Agreement was that the defendants agreed to transfer 64+- acres of land (including 40+- acres of forestland and 24+- acres of non-forestland) at 364 West Street to the Town for the sum of $587,500. Id. The Parties filed their Stipulation of Dismissal with Prejudice on February 10, 2021. G&U filed a Motion to Dismiss its Verified Petition for Declaratory Order with the STB on February 15, 2021. Milanoski Aff., ¶21. On February 17, 2021 the STB allowed G&U's Motion to Dismiss. Id.

[3] In a filing in the subsequent Citizens Suit, the Town explained its decision to enter into the Settlement Agreement: "During the course of the Land Court proceedings and mediation, however, the Board determined that pursuing its Land Court case to trial, as well as having to defend the Town's position before the Surface Transportation Board, would not only be prohibitively expensive but could well result in the Town receiving **none** of the 155 acres." Keavany Aff., Ex. 2 (Opposition of Defendants Town of Hopedale, Louis J. Arcudi, III and Brian R. Keyes to Plaintiffs' Motion for Preliminary Relief), p. 6 (emphasis in original).

Before the Settlement Agreement was executed by the parties and before the Stipulation of Dismissal was filed with this Court, on February 7, 2021, the Town received a letter from an attorney stating that he represented 10-Taxpayers in Hopedale and that the 10-Taxpayers were prepared to file suit pursuant to G.L.c. 40, §53 against the Town, claiming that the Town could not use the funds appropriated at the October 2020 Special Town Meeting to acquire the property described in the Settlement Agreement. Keavany Aff., Ex. 4. Indeed, the letter "serve[d] notice to the [Board] that the Hopedale Citizens intend to sue the [Board] pursuant to M.G.L. 40 §53 (restraint of illegal expenditures) …in the event the [Board] does not suspend its actions towards finalizing the Settlement …" Id. On February 8, 2021, counsel for the 10-Taxpayers appeared before the Board repeating much of what was contained in his February 7 letter and threatening a 10-Taxpayer lawsuit against the Town if the Board voted to approve the Settlement Agreement. Milanoski Aff., Ex 4. With full knowledge of these threats, the Board voted to approve the Settlement Agreement on February 8, 2021 and signed the Settlement Agreement the next day, February 9, 2021. Id. The parties docketed the Stipulation of Dismissal With Prejudice two days after the Board meeting, on February 10, 2021.

THE SETTLEMENT AGREEMENT

The parties negotiated a fair and just resolution to their competing and disputed claims to the forestland property over a period of weeks in January and February 2021, which included a compromise of the Town's disputed and hotly contested Chapter 61 claim to acquire 130 acres +- for $1,175,000, the Town's disputed eminent domain claim, and G&U's STB Petition. The parties acknowledged the significant consideration being exchanged in the Settlement Agreement by stating the following:

> WHEREAS, in order to avoid the time and expense of litigation and without any admission of liability by any of the Parties, the Parties desire to settle fully and finally all

differences between them regarding the Litigations, including specifically legal rights to real property located at 364 West Street, Hopedale, MA and any and all claims that were raised or could have been raised therein and any and all defenses and counterclaims that were raised or could have been raised therein;

NOW THEREFORE, in consideration of the promises and covenants set forth below, including, but not limited to, the Mutual Release of Claims, and for other good and valuable consideration as set forth in this Agreement, the receipt and sufficiency of which are acknowledged, the Parties agree as follows: [emphasis supplied]

Milanoski Aff., Ex. 2. The Settlement Agreement consists of the following material consideration and obligations:

- Defendants agreed to convey 64+- acres at 364 West Street (Parcel A on plan attached to Settlement Agreement) to the Town in consideration of a payment of $587,500;
- Defendants agreed to donate 20+- at 363 West Street (Parcel D on the plan attached to the Settlement Agreement) to the Town for conservation purposes;
- Defendants agreed to impose Ground Water Protection Deed Restrictions on 50+ acres of land retained by the Defendants at 364 West Street;
- The Town, through its Board of Selectmen/ Select Board waived any and all right of first refusal claims under Chapter 61;
- Defendants agreed to Army Corp of Engineer deed restrictions on 84 acres (Parcels A and D on plan attached to Settlement Agreement);
- Defendants agreed to a 5 year no-build restriction on 300,000+- square feet land retained by defendants (part of Parcel E on plan attached to Settlement Agreement).
- Defendants' agreement to work in good faith with the Town to develop potential well on Parcel A on plan attached to Settlement Agreement;
- Agreement between parties to Cost Share for water testing/ hydrogeological analysis on Parcel A and to share costs with respect to engineering and survey work;
- Agreement by Defendants to install monitoring wells at their own expense on Parcels B, C, and E and share information with Town from monitoring;
- Defendants' agreement to restrict buildout of Parcel B to enclosed buildings/structures;
- Defendants' agreement to a 50-foot easement restriction building in riparian buffer zone on Parcels B and C;

- Withdrawal of the STB Petition for Declaratory Order by G&U; and
- Mutual Releases.

Id. The G&U Defendants have been acting in conformity with the terms of the Settlement Agreement since it was executed in February 2021, incurring significant expenses and dismissing its STB Petition.

THE CITIZENS SUIT

Consistent with their threats of February 7 and February 8, the 10-Taxpayers filed their lawsuit on March 3, 2021 in Worcester Superior Court and in Count I, the 10-Taxpayers alleged that the Town's October 2020 Special Town Meeting appropriation of funds to acquire all of the forestland property did not authorize the Board to spend part of the funds to acquire part of the forestland property. Under Count I, the 10-Taxpayers sought to enjoin the Town from spending money appropriated at the October 2020 Special Town Meeting to purchase the property contemplated by the Settlement Agreement, pursuant to G.L.c. 40 §53.[4]

On April 16, 2021, the G&U Defendants served the 10-Taxpayers with a motion for judgment on the pleadings on Count II – the only count asserted against them. The Town also moved for judgment on the pleadings on all three Counts.[5] The 10-Taxpayers cross-moved for judgment on the pleadings. In November 2021, the Superior Court (Goodwin, J.) issued a

[4]In Count II, the 10-Taxpayers alleged that the Board lacked authority to waive the purported G.L.c.61 option and further sought to compel the Board to recover the waived and released option and acquire the subject land. Count III alleged that the Town had dedicated the subject land—which it never actually acquired—as parklands and sought a declaration that the land was protected under Article 97 of the Amendments to the Massachusetts Constitution.

[5]Throughout the Citizen Suit, the Town claimed that its Board had, and properly exercised, the sole authority to enter into the Settlement Agreement and to waive the Town's G.L. c. 61 rights to the Forestland. It wrote: "This [i.e., the Land Court action] was a duly litigated lawsuit between the only parties in interest, it was resolved via a settlement agreement and joint stipulation of dismissal with prejudice, and both parties gave up interests that they claimed for their own in resolving the case (the Plaintiffs' claim that the Agreement is a void contract because the Town received no consideration is baseless)." See Keavany Aff., Ex. 3, p. 13.

Memorandum of Decision and Order on the competing motions for judgment on the pleadings and entered Judgment on November 10, 2021 in favor of the 10-Taxpayers on Count I, in favor of G&U, the Trust and the Town on Count II, and in favor of the Town on Count III. See, Keavany Aff., Ex. 1. As a result of Judgment entering in favor of the 10-Taxpayers on Count I, the Town is enjoined from using funds appropriated at the October 2020 Special Town Meeting to acquire the property described in the Settlement Agreement.

On December 28, 2021, the Board issued a "Statement on Status of Litigation Involving 364 West Street." Milanoski Aff., Ex. 5. In this document, the Board outlined its decision not to attempt to acquire the land described in the Settlement Agreement, but to instead proceed with filing the subject Motion to Vacate. Id. The Board noted (and the G&U Defendants agree) that "the Superior Court judgment has no binding effect whatsoever on what the Land Court may do with the Town's attempt to reopen the case." Id. To date, the Town has taken no steps to schedule a new Special Town Meeting to appropriate money to acquire the property described in the Settlement Agreement[6], but instead moved to vacate the parties' agreed Stipulation of Dismissal with Prejudice.

ARGUMENT

I. Mass. R. Civ. P. 60(b)(5) Does Not Apply.

Mass. R. Civ. P. 60(b) states in part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (5) … it is no longer equitable that the judgment should have prospective application..." The Town argues that the Stipulation of Dismissal must be vacated

[6] Nor has the Town attempted to engage the G&U Defendants in good faith negotiations to remedy any issues posed by the judgment in the 10-taxpayer case pursuant to Section 10 of the Settlement Agreement if it believed that a provision of the agreement was invalid or ineffective.

pursuant to Rule 60(b)(5) because "it is no longer equitable that the judgment should have prospective application… particularly because of changed conditions." Motion, p. 10. However, "[t]he third clause of Rule 60(b)(5) only applies to judgments having a prospective effect, as, for example, an injunction, or a declaratory judgment." See, 1973 Reporter's Notes to Rule 60(b) of the Massachusetts Rules of Civil Procedure. Unlike, e.g., permanent injunctions or declaratory judgments, a Stipulation of Dismissal voluntarily docketed by the parties does not have prospective effect. "[N]early every Circuit Court of Appeals to decide the issue has held that a dismissal is not a judgment with prospective application." Comfort v. Lynn Sch. Comm., 541 F. Supp. 2d 429, 433 (D. Mass. 2008) (collecting cases). Rule 60(b)(5) is not available to a party, like the Town here, who merely has determined that "it is no longer convenient to live with the terms of" a judgment or order. Great Woods, Inc. v. Clemmey, 89 Mass. App. Ct. 788, 795-796 (2016), quoting, Rufo v. Inmates of Suffolk County Jail, 502 US 367, 383 (1992). Accordingly, the Town's Motion pursuant to Rule 60(b)(5), must be summarily denied.

II. The Town has Failed to Meet its Burden Under Mass. R. Civ. P, 60(b)(6).

A. Rule 60(b)(6) Has Extremely Meagre and Limited Scope.

The Town's Motion under Rule 60(b)(6) fares no better. Rule 60(b)(6) states that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons…(6) any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) is considered a catch-all and applies only where none of sections (b)(1) – (b)(5) of Rule 60 apply. The decision to deny a Rule 60(b)(6) motion is solely within the discretion of the trial Court. Klimas v. Mitrano, 17 Mass. App. Ct. 1004, 1004 (1984). "Rule 60(b)(6) has an extremely meagre scope and requires the showing of compelling or extraordinary circumstances. Extraordinary circumstances may

include evidence of actual fraud, a genuine lack of consent, or a newly-emergent material issue." DeMarco v. DeMarco, 89 Mass. App. Ct. 618, 621-622 (2016)(internal quotations and citations omitted). The Court must consider whether the existence of exceptional circumstances warrant relief from judgment, whether the movant has a meritorious claim, and whether granting relief will affect the substantial rights of the parties. See Mt. Ivy Press, L.P. v. Defonseca, 78 Mass. App. Ct. 340, 346 (2010).

Further, Rule 60(b)(6) is applied with "particular stringency to consent judgments." Bernstein v. Planning Bd. of Wayland, 100 Mass. App. Ct. 1101 (2021) (Rule 1:28 Decision) (citing Thibbitts v. Crowley, 405 Mass. 222 (1989)). "Generally, a court will not modify, or relieve a party from, a stipulated judgment." Reznik v. Yelton, 2011 Mass. App. Div. LEXIS 8, *17 (App. Div. Jan. 14, 2011), citing Quaranto v. DiCarlo, 38 Mass. App. Ct. 411, 412 (1995). "And when, as in this case, the [plaintiff] made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, [its] burden under Rule 60(b) is perhaps even more formidable than had [it] litigated and lost." Thibbitts, 405 Mass. at 227, quoting United States Steel Corp., 601 F.2d at 1274. See also Quaranto, 38 Mass.App.Ct. at 412-413. ("If a court may not relieve parties of a consent judgment that spells out the terms of settlement, there is even less basis for relief from judgment on the basis of alleged failure to act in accordance with a collateral but extrinsic and unmentioned agreement").

The Appeals Court recently stated in Bernstein that a party seeking relief based on newly-emergent issues bears the burden of showing "a significant change in either factual conditions or law" and that such changes were not "actually…anticipated" when judgment entered. 100 Mass. App. Ct. 1101, at *8-9, quoting Rufo, 502 U.S. at 384-385. The Town has failed to meet this extraordinary burden. The dismissal in this Land Court case entered by stipulation after the 10-

taxpayers threatened litigation regarding the funding for the purchase of the land described in the Settlement Agreement. Thus, the Town has not identified a newly emergent issue warranting vacating the Stipulation of Dismissal.

B. The Town has Not Identified Extraordinary Circumstances to Prevail on a Rule 60(b)(6) Motion.

Plaintiffs do not allege fraud or lack of consent in their Motion, but rely solely on the Judgment that entered on Count I in favor of the 10-Taxpayers in the Citizens Suit as meeting its burden to show the existence of a "newly emergent material issue" justifying the vacation of the Stipulation of Dismissal entered on February 10, 2021. See Town's Motion, pp. 11-12. Initially, as set forth at Part B(7), infra, the underlying claim by the ten-taxpayers in Count I of the Citizens Suit is not "newly emergent" as it emerged before the Settlement Agreement was signed and before the Stipulation of Dismissal was filed, but more importantly, the judgment that entered on Count I in the Citizens Suit did not invalidate the Settlement Agreement.

1. The Settlement Agreement Remains Valid.

The gravamen of this Land Court action filed in November 2020 sought a determination of the validity of the Town's chapter 61 option relative to the land at issue. The G&U Defendants vigorously contested the validity of any Chapter 61 option asserted by the Town and filed a petition with the STB seeking a determination that Federal Law preempted the application of Chapter 61. At that point in time all the Town possessed was a disputed claim to a Chapter 61 option which was being challenged in this court and before the STB. The Town faced years of expensive litigation with no guarantee of success on its Chapter 61 option claim.

With the strong encouragement of this Court, the Town and the G&U Defendants engaged in two days of mediation before retired Land Court Judge Lombardi resulting in a settlement which, among many other benefits, provided the Town with an uncontested right to

purchase the portion of real estate at issue most beneficial to the Town for half of the cost of the contested Chapter 61 option price. The Board, on behalf of the Town, negotiated a settlement which traded a vigorously contested alleged Chapter 61 purchase option for a certain and uncontested purchase option. The Town has already received exactly what it bargained for in the Settlement Agreement: an exchange of a hotly contested alleged Chapter 61 purchase option for 130+- acres of land for a certain right to purchase 64+- acres of land for roughly half the price (in addition to the right to accept an additional 20+- acres at 363 West Street by donation). It has also received the benefit of an Army Corp. Engineers restriction on these 84 acres, which contain conservation-based covenants preserving the subject land in its natural condition in perpetuity.

This is the typical outcome of innumerable settlements of litigation. Here, both the G&U Defendants and the Town were litigating the right to own all of the land at issue. They compromised with a settlement which divided the land between them. The consideration in this Settlement Agreement was not the conveyance of the land in question, rather it was the right to purchase the agreed portion of the land. The G&U Defendants remain ready, willing and able to convey the land it agreed to convey in the Settlement Agreement at the agreed price. The Town continues to have the ability to acquire this land. The Town's refusal to take the necessary steps to acquire the property does not invalidate the Settlement Agreement.[7]

[7] Indeed, the Town's lack of action in this regard is violative of the covenant of good faith and fair dealing. See K.G.M. Custom Homes, Inc. v. Prosky, 468 Mass. 247, 254 (2014)("Every contract implies good faith and fair dealing between the parties to it. The implied covenant of good faith and fair dealing provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract ... T]he implied covenant exists so that the objectives of the contract may be realized.")(internal quotations and citations omitted).

2. The Town has Acknowledged Receipt of Sufficient Consideration.

The Town asserts at page 1 of its Motion that the Superior Court determined that it "lacked authority to complete the agreed upon land acquisition and that the Settlement Agreement was not effective, and void for failure of consideration." At page 14 of its Motion, the Town states that "… the subsequent Citizens Suit prevented the Town from receiving the essential consideration for which it bargained." These assertions are nonsensical. The Town has received all of the consideration for which it bargained. The Town completely ignores the consideration clause in the Settlement Agreement which states in relevant part:

> NOW THEREFORE, in consideration of the promises and covenants set forth below, including, but not limited to, the Mutual Release of Claims, and for other good and valuable consideration as set forth in this Agreement, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

The consideration for the settlement agreement was and is the promises and covenants and mutual releases set forth in the agreement. With respect to Parcel A, the Town has already received from the G&U Defendants the promise to sell that land to the Town for $587,500. The G&U Defendants have repeatedly confirmed its willingness to meet this obligation and stand ready, willing and able to convey this property to the Town. The Town has a legally enforceable right to purchase Parcel A if it chooses to do so. That the Superior Court has opined that the Town cannot exercise this option to purchase Parcel A until and unless the Town Meeting agrees to do so and appropriates the funds does not result in a failure of consideration. The fact that the Town Meeting might decide not to exercise that right does not result in a failure of consideration. A party to a contract cannot claim failure of consideration because it decides not to complete a real estate purchase on the agreed upon terms. See note 7, supra.

3. The Judgment on Count I in the Superior Court Case Does Not Render the Town Incapable of Acquiring the Land.

The Town's argument that the Superior Court decision renders the Town incapable of acquiring the land contemplated under the Settlement Agreement – has no factual or legal support. All the Town needs to do to acquire the land is to hold a Town Meeting to authorize the acquisition and appropriate the necessary funds. The Town is perfectly capable of appropriating the necessary funds to purchase the land set forth in the Settlement Agreement. Any decision by the Town Meeting not to appropriate the necessary funds is a choice made by the Town.[8] If the Town decides not to take advantage of its right to purchase the land that is a choice by the Town; not a failure of consideration due from the G&U Defendants.

4. The Board had Authority to Enter into the Settlement Agreement on Behalf of the Town.

There is no dispute that the Board had authority to negotiate and settle the Land Court case. Section 32-1 of the Town of Hopedale Bylaw states that "The Selectmen shall be agents of the Town to institute, prosecute and defend any and all claims, actions and proceedings to which the Town is a party or in which the interests of the Town are or may be involved." Milanoski Aff. Ex. 3. See further, Northgate Constr. Corp. v. Fall River, 12 Mass. App. Ct. 859, 860-861 (1981)(a municipality, "as part of its general power to sue and be sued, has the inherent implied power to effect a settlement by compromise in good faith of genuine claims against it… The city need not insist on litigating them with uncertain cost, difficulties, and outcome. This power existed prior to the Home Rule Amendment, art. 89 of the Amendments to the Constitution of the

[8] In support of its decision not to schedule a Town Meeting, the Town asks the Court to accept as fact that an appropriation would not be approved. To the extent public sentiment is against the Settlement Agreement, it is because the ten-taxpayers assert without factual or legal support that the Town will prevail in acquiring all of the forestland property.

Commonwealth. Nothing in that amendment or in any relevant statute has been shown to preclude exercise of the implied power.")

Moreover, as recognized by the Superior Court, G.L.c. 61 gives the Board sole authority to exercise (subject to adequate appropriation) or decline to exercise a G.L.c. 61 option to purchase. The Board could have settled this Land Court litigation by waiving the Town's G.l.c.61 option in its entirety. It could have dismissed the Town's claim without any consideration if it determined – as it explicitly did here – that it would not be in the Town's interest to pursue expensive litigation to an uncertain result. Since the Board has the sole authority to waive the G.L.c. 61 option in its entirety, the Board necessarily has the authority to waive the G.l.c. 61 option in exchange for the right of the Town to purchase a portion of that property for a lower price. Put another way, there can be no dispute that the Settlement Agreement would be valid without the provisions allowing the Town to purchase Parcel A for $587,500. The mere inclusion of that provision, which gives the Town a new right to purchase, does not vitiate the Settlement Agreement. And, the fact that the exercise of this new right to purchase is subject to Town Meeting appropriation of $587,500 does not invalidate the agreement, it merely gives the Town the option of purchasing or not purchasing Parcel A. The G&U Defendants are obligated to sell the Town Parcel A if the Town decides to purchase it.

5. Judgment on Count I in the Superior Court did not Invalidate the Settlement Agreement.

The Plaintiffs in the Citizens Suit had no standing to challenge the legality of a Settlement Agreement to which they are not parties. See, e.g., Hapgood v. Town of Southbridge, 11 Mass. L. Rep. 632 (Super. Ct. June 1, 2000) ("The Superior Court does not have general equity jurisdiction to entertain a suit by individual taxpayers to restrain cities and towns from carrying out invalid contracts and performing other similar wrongful acts."). No judgment has

entered against the Town or the G&U Defendants declaring that the Settlement Agreement is invalid or unlawful. The sole effect of the Judgment that entered on Count I in the Citizens Suit is that the Town may not purchase Parcel A for $587,500 until and unless the Town Meeting appropriates the funds for this specific purchase. It is within the sole power of the Town to remove this one impediment to the purchase of Parcel A. The Settlement Agreement remains valid and enforceable.

6. The Town Ignores the Severability Clause.

The Town ignores the fact that the Settlement Agreement contains a severability clause in Section 10, which was negotiated and agreed to by all parties. The severability clause clearly states that if any provision is deemed unenforceable by a court the remaining conditions remain in full force and effect. If the specific provision of the Settlement Agreement addressing the conveyance of Parcel A becomes unenforceable because the Town Meeting now refuses to fund it, the remaining provisions of the Settlement Agreement remain fully enforceable.

7. The Town has not Identified a Newly Emergent Material Issue.

The purported newly emergent "material issue" identified by the Town in its Motion – the Judgment that entered on Count I of the Citizen Suit – is an issue that emerged before the parties executed the Settlement Agreement and filed the Stipulation of Dismissal. The legal arguments made by the 10-Taxpayers in the Citizens Suit were the very same arguments conveyed to the Town on February 7-8 before the Stipulation of Dismissal was filed. In spite of these arguments and threats of litigation, the Board voted to approve the Settlement Agreement on February 8, executed the Settlement Agreement on February 9, and authorized the filing of the Stipulation of Dismissal on February 10.

For the above reasons, even if the Citizen Suit somehow caused the Settlement Agreement to be invalidated, it would not follow that the Stipulation of Dismissal could be vacated. The stringent Rule 60(b)(6) standard is only satisfied by litigation over a "newly-emergent issue." See, Bernstein, supra. To qualify as newly emergent, the litigation must concern a significant change in fact or law that was not actually anticipated by the parties prior to the judgment. Id. That Judgment may enter on Count I of the Citizens Suit enjoining the use of funds appropriated in October 2020 to purchase land described in the Settlement Agreement was known to the Town prior to executing the Settlement Agreement and stipulating to judgment. The Town cannot claim now that it did not anticipate the possibility that the use of the funds appropriated in October 2020 to acquire the property described in the Settlement Agreement might be enjoined. Accordingly, assuming arguendo, that the Settlement Agreement (or a part of the Settlement Agreement) is deemed invalid, the Town would still fall short of meeting its burden under Rule 60(b)(6), and its Motion should be denied.

8. Vacating the Stipulation of Dismissal Would be Futile.

If this Court were to vacate the Stipulation of Dismissal that action would be futile since the Settlement Agreement contains mutual releases. Among other things, the Town's release of the G&U Defendants releases all Chapter 61 claims and rights of first refusal. This Court has no ability on a motion to vacate a Stipulation of Dismissal to rescind the Settlement Agreement. Therefore, if this Court were to vacate the Stipulation of Dismissal with Prejudice this action would be subject to an immediate motion to dismiss based upon the release of all of the Town's claims against the G&U Defendants.[9]

[9] For this reason alone, the Town's Motion also fails to meet the typical Rule 60(b)(6) standard, which requires the Town to establish that it has a meritorious claim, that the substantial rights of the G&U Defendants would not be affected, or that manifest injustice would result from the denial of the Motion. See Mt. Ivy Press, L.P., 78 Mass. App. Ct. at 346. The Town's waiver and release renders its G.L. c. 61 claim less meritorious than when this Court

C. The Cases Relied Upon by the Town are Easily Distinguishable.

The Town cites to Bowers v. Bd. of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983) in support of its Rule 60(b)(6) argument, but Bowers involves facts that are materially different than before this court. In Bowers, as part of a settlement of a zoning appeal in the Town of Marshfield, the Board of Selectmen agreed that judgment enter permanently enjoining the Town from using certain Town property. The Board lacked authority in Bowers to make such an agreement for judgment since only the Town Meeting had such power. Here, the only judgment that entered was a dismissal with prejudice. It is beyond dispute that the Board had sole authority to control and settle litigation and agree to a stipulation of dismissal with prejudice in accordance with Section 32.1 of the Town's General Bylaws. In this case, the claim is that the Town does not have the authority to purchase Parcel A without further Town Meeting action. In fact, as opposed to the facts in Bowers, this allegedly unlawful conveyance has not occurred. It is also important to note that the Bowers court vacated only that portion of the agreed judgment which was beyond the power of the Board. The remaining provisions of the judgment remained in effect. In other words, the Appeals Court imposed a severability clause into that Judgment (which is already present in the Settlement Agreement here). Contrary to Bowers, in this case, the judgment does not require the Town to do anything, let alone anything for which it lacks authority. To the extent the Town now argues that the Settlement Agreement requires it to do

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denied the Town's Motion for Preliminary Injunction. The Town settled the case, and explicitly stated that it did so because its chances of success on its Chapter 61 claims were uncertain. See Keavany Aff., Ex. 2, p. 6 ("the Board determined that pursuing its Land Court case to trial…could well result in the Town receiving **none** of the 155 acres.") The Town's current position that "without question, the Board validly exercised the Chapter 61 option" (Motion, p. 8) would come as a surprise to anyone who read the Board's public statements or the Town's submissions in the Citizen Suit which consistently casted doubt on the Town's chances of success in the underlying action here. Vacating the dismissal would also drastically affect the Railroad Defendants' substantial rights, because in reliance on the dismissal the G&U Defendants dismissed their Petition to the STB. Milanoski Aff., ¶¶13, 15, 19-21. The G&U Defendants have also spent approximately $210,000 to prepare the subject land for development in reliance on the dismissal of this case. Id., ¶19.

something beyond its authority, such an argument is well beyond the scope of a Rule 60(b) motion to vacate the judgment. See Quaranto, 38 Mass.App.Ct. at 412-413 (stating that there is virtually no Rule 60(b) basis to disturb a settlement agreement collateral to a judgment).

Likewise, Abrams v. Bd. of Selectmen of Sudbury, No. 09-P-1226, 76 Mass. App. Ct. 1128 (May 3, 2010)(Rule 1:28 decision) is not on point. Abrams stands for the proposition that had the G&U Defendants conveyed Parcel A to the Town and the Court subsequently found the Town could not pay $587,500 then the Town would be required to reconvey Parcel A to the GU Defendants. Here, the GU Defendants have entered into a binding agreement to sell Parcel A, the Town has not yet purchased Parcel A and if the Town Meeting decides not to exercise the Town's option to do so, no conveyance takes place. However, this does not result in a failure of consideration for the Settlement Agreement, which was an exchange of promises, covenants and releases, when the G&U Defendants are ready, willing and able to fulfill all of its promises and obligations.

The Town also misplaces reliance on Reading Dev. Co. II, L.L.P. v. First Nat. Stores, Inc., No 981187, 2001 WL 1174190 (Mass. Super. July 30, 2001) at page 11 of its Motion. In Reading Dev., the plaintiff sought to reopen a case that was settled and where a Stipulation of Dismissal without prejudice was previously filed, on the grounds that the defendant breached its obligations within the subject settlement agreement. The Court in Reading Dev. granted plaintiff's motion stating in part that "the failure of the defendant to abide by the terms of the settlement agreement is reason for this court to vacate the stipulation of dismissal and reopen the above captioned case." There is no such breach alleged against the G&U Defendants in this case. If any party is in breach of its obligations in this case, it would be the Town, but the Town does not get to create a breach of the agreement or of the implied covenant of good faith and fair

dealing (note 7, supra), and then use that breach as the sole basis for seeking to vacate the Stipulation of Dismissal with Prejudice.

Similarly, Greater Bos. Legal Servs. v. Haddad, No.935961, 2000 WL 1474516 (Mass. Super. June 28, 2000) does nothing to advance the Town's Rule 60(b)(6) Motion. In Haddad, extraordinary circumstances were established by the plaintiff where the defendant purposely and fraudulently set out to deprive the plaintiffs' attorneys from collecting an award of attorney's fees by having the plaintiff sign and file a stipulation of dismissal. The Town has not alleged any wrongdoing committed by the defendants in this case, nor could it. The defendants have consistently acted in conformity with the Settlement Agreement and were joined at the hip with the Town defending against the Citizens Suit. The Town has not established entitlement to relief under either Rule 60(b)(5) or (b)(6) and accordingly, the Town's Motion should be denied.

D. There is no Basis for Continuing the Superior Court's Injunction.

The Town is not entitled to continuation of the injunctive relief entered by the Superior Court for the purpose of allowing the Town time to decide whether to seek new appropriation authority or to attempt to reassert its G.L. c. 61 right. This Court denied the Town's request for injunctive relief in November 2020. Since then, the Town has dismissed its claim, waived any G.L. c. 61 rights, and released its claims against the G&U Defendants.

CONCLUSION

For the reasons set forth above, plaintiff, Town of Hopedale has failed to meet its burden under either Mass. R. Civ. P. 60(b)(5) or (b)(6) and respectfully requests that the Court deny Town of Hopedale's Motion to Vacate Stipulation of Dismissal with Prejudice and deny their request to continue the injunctive relief entered under Count I in the Citizens Suit.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed by email on January 18th, 2022 will be sent by separate email to.

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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.2185CV00238D

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMING, and JANICE DOYLE, Plaintiffs	)
vs.	)
TOWN OF HOPEDALE, LOUS J. ARCUDE, III, BRIAN R. KEYES, JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, ONE HUNDRED FORTY REALTY TRUST and GRAFTON & UPTON RAILROAD COMPANY, Defendants	)

G&U DEFENDANTS' FURTHER SUPPEMENTAL OPPOSITION TO TOWN OF HOPEDALE'S EMERGENCY MOTION FOR FURTHER EXTENSION OF INJUNCTION ORDER IN LIGHT OF LAND COURT'S JANUARY 28, 2022 DECISION

Grafton and Upton Railroad Company ("G&U") and Jon Delli Priscoli and Michael R. Milanoski, Trustees of the One Hundred Forty Realty Trust (the "Trust") (collectively, the "G&U Defendants") submit this brief further supplemental response to the Emergency Motion of the Town of Hopedale, Louis J. Arcudi, III, and Brian R. Keyes For Further Extension of Injunction Order in light of the January 28, 2022 Decision of the Land Court (Rubin, J), denying the Town's Motion to Vacate the February 2020 Stipulation of Dismissal With Prejudice.[1]

[1] The Land Court's January 28, 2022 Decision was forwarded to this Court by email of the Town's counsel on Friday, January 28, 2022 and is not reproduced here.

Judgment entered in this Superior Court case on November 10, 2021 in favor of the plaintiffs and against the Town on Count I. Even though they were not parties to Count I, Judgment on Count I included equitable relief that enjoined the G&U Defendants "for 60 days from the date of this Judgment from carrying out any work on the contested forest land." According to the Superior Court's accompanying Memorandum of Decision and Order, the purpose of the 60-day injunctive order was to afford the Town time to make a decision to either 1) schedule a Town Meeting to vote on whether to appropriate a new sum of money to acquire the property described in the Settlement Agreement, or 2) to return to Land Court to attempt to vacate the Stipulation of Dismissal that entered with prejudice in February 2021 and, if successful, seek to enforce whatever G.L.c. 61 rights the Town maintained in that court.

The parties agreed to continue the injunction entered under Count I through January 31, 2022. No party moved to amend or alter the judgment on Count I and no party appealed from the Judgment on Count I. Count II against all defendants was dismissed by this Court. Count III against the Town was dismissed by this Court. The plaintiffs have appealed the judgment that entered against them on Counts II and III.

On December 30, 2021, the Town filed a Motion to Vacate the Stipulation of Dismissal that entered in the Land Court on February 10, 2021. The Town also sought a preliminary injunction to enter against the G&U Defendants as part of its Motion to Vacate. Concerned that the Land Court would not rule on its Motion to Vacate before January 31, 2022, on January 11, 2022, the Town moved on an emergency basis in this Court seeking to extend the injunction that entered under Count I through May 1, 2022, "or until the Land Court issues its own injunctive order, whichever occurs first." On January 24, 2022, the Land Court held a hearing on the Town's Motion to Vacate. Four days later, on January 28, 2022, the Land Court denied the

Town's Motion to Vacate (and through that denial, denied the Town's request for an injunctive order).

The purpose of the 60-day injunction against the G&U Defendants has been met. The Select Board of the Town voted to forego the scheduling of a Town Meeting vote to appropriate new funds to acquire the property described in the Settlement Agreement and instead voted to file a Motion to Vacate in Land Court. The Town's January 11, 2022 "Emergency Motion" was filed due to the concern that the Land Court would not act on the Town's Motion to Vacate before January 31, 2022. However, the Land Court has in fact decided the Town's Motion to Vacate before January 31, 2022. The Town is not entitled to an extension of the temporary injunction that entered under Count I. Indeed, the Town has never established entitlement to any injunctive relief against the G&U Defendants. There are no pending claims asserted by the Town against the G&U Defendants. If the Town does intend to pursue new claims against the G&U Defendants, the Town may move in that new action for injunctive relief.[2] However, further injunctive relief is not appropriate in this Superior Court case, which went to judgment almost three months ago on November 10, 2021.

CONCLUSION

For the reasons set forth above, the Town's Emergency Motion for Further Extension of Injunction Order should be denied.

[2] The G&U Defendants do not concede that any new claim asserted by the Town would be meritorious.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST

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